United States Court of Appeals

for the Second Circuit

APPENDIX

Docket No

74-1527

IN THE UNITED STATES COURT OF APPEALS FOR

THE SECOND CIRCUIT

B
Pas
in Brief

FRANCIS C. PLANO,

Appellant,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK B. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

DOCKET NO.

74-1527

Appellees.

APPENDIX

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Attorneys for Appellees (Baker, Melie, Acee, Barns, Nowak, Plehn, Richards, Romeo & Walker)
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Of Counsel:

James R. Sandner
Ivor R. Moskowitz

UNITED STATES COURT OF APPEALS
FILED
JUN 4 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES

DATE		
1973		
December 21	(1)	Filed Complaint Issued summons-original-22 copies and delivered to Marshal for service
December 28	(2)	Filed Summons Served 12/27/73 on all parties
1974		
January 14	(3)	Filed Notice of Motion returnable January 21, 1974 at Albany, Motion for Temporary Restraining Order and Preliminary Injunction and Affidavit of Mailing
January 15	(4)	Filed Answer of Clifford W. Baker et al as individuals
January 15	(5)	Filed Answer of Clifford W. Baker et al as Supervising Principal and officers
January 15	(6)	Filed Notice of Cross-Motion to dismiss and answering affidavits-motion returnable January 21, 1974 at Albany-Defendants Baker, Melie, Acee, Burns, Nowak, Plehn, Richards, Romeo and Howard Walker
January 15	(7)	Filed Notice of Cross-Motion to dismiss and answering affidavits-returnable January 21, 1974 at Albany-Defendant Board of Education, et al
January 16	(8)	Filed Answering Affidavit on Motion.
January 16	(9)	Filed Affidavit of service of answer and notice of cross-motion and supporting
January 21	(10)	Filed Plaintiff's Memorandum of Law in support of motion for Temporary Restraining Order

January 21	(11)	Filed Notice of Motion to dismiss by defendant Johnson.
January 21		Motion for Temporary Restraining Order and Preliminary Injunction. Cross-motion to dismiss complaint. Decision reserved. Ten days to file briefs and reply to TRO.
January 31	(12)	Filed defendants' Memorandum in Opposition
January 31	(13)	Filed Supplemental Affidavit of John Acee, et al
January 31	(14)	Filed Supplemental Affidavit of Clifford W. Baker
February 1	(15)	Filed Plaintiff's Reply Brief
February 1	(16)	Filed Supplemental Affidavit of Francis C. Plano
February 13	(17)	Filed Request to Produce to F. Wright Johnson and Affidavit of Service
February 13	(18)	Filed Request to Produce to Clifford W. Baker, et al and Affidavit of Service
February 13	(19)	Filed Request to Produce to Clifford W. Baker, et al and Affidavit of Service
February 15	(20)	Filed Memorandum-Decision and Order granting defendants motion to dismiss, and denying plaintiff's motion for temporary restraining order and preliminary injunction and dismissing complaint for lack of jurisdiction
February 15	(21)	Filed Judgment
February 28	(22)	Filed Motion to Reconsider, returnable March 18, 1974 at Albany
February 28	(23)	Filed Plaintiff's Memorandum of Law in support of motion for reconsideration.
March 8	(24)	Filed Answering Affidavit in opposition to motion to reconsider

March 12	(25)	Filed Answering Affidavit in opposition to affidavit filed 3/8/74 and memorandum.
March 13	(26)	Filed copy of transcript of proceedings held Jan. 21, 1974 before Judge Foley.
March 18	(27)	Filed Order (3/18/74) denying motion for reconsideration and amendment of Decision.. Order and Judgment. (Hon. James T. Foley, USDJ)
March 18	(28)	Filed Notice of Appeal
March 18	(29)	Filed Bond on Costs of Appeal
March 18		Motion for reconsideration and amendment of decision, Order and Judgment, Motion denied.
March 19	(30)	Filed clipping from Times-Union, Albany, NY, March 18, 1974, Page 3R re Sex Education
March 22	(31)	Filed Affidavit of Service of Order denying motion for reconsideration, etc.
April 24		Sent certified copy of Record on Appeal to CCA, 2nd Circuit
April 29	(32)	Filed receipt of CCA for papers forwarded
	(33)	Received and forwarded transcript of argument on motion for reconsideration to CCA, 2nd Circuit.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF NEW YORK

Civil Action No. 73-CV562

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon BERNARD F. ASHE, ESQ., plaintiff's attorney, whose address is 80 Wolf Road, Albany, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____

Clerk of Court.

Deputy Clerk.

Date: December 21, 1973 [Seal of Court]

NOTE:--This summons is issued pursuant to Rule 4 of the Federal Civil Procedure.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

COMPLAINT

73-CV-562

Now comes the plaintiff, Francis C. Plano, by and through his attorney, Bernard F. Ashe, Esq. (James R. Sandner and Ivor R. Moskowitz, Esqs. of Counsel), and alleges for his complaint in this action as follows:

1. That this action arises under the First and Fourteenth Amendments to the United States Constitution, and this court has jurisdiction over it pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343(3), and 42 U.S.C. §1983.

2. That the defendants John Acee, Cynthia Barnes, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo and Howard Walker, constitute the Board of Education of the Westmoreland Central School District, Westmoreland, New York, having been duly elected members thereof.

3. That the defendants Acee, Barnes, Nowak, Plehn, Richards, Romeo

and Walker, as a board of education are empowered by §3013 of the Education Law of the State of New York to grant probationary status to newly hired teachers upon the recommendation of the district superintendent of schools; and are empowered under §3013 of the Education Law to terminate, upon the recommendation of the district superintendent of schools, the employment of any probationary teacher within their employ.

4. That defendant Baker, as Supervising Principal is an employee and the chief school administrator of the Westmoreland Central School District; and defendant Melie is the Clerk of the Board of Education of the Westmoreland Central School District and an employee of the Board of Education.

5. That defendant Johnson, as District Superintendent of Oneida 1-Madison-Herkimer Counties, is an employee of the Commissioner of Education of the State of New York and the district superintendent of respondent Board's School District for purposes of the Education Law of the State of New York. Said defendant for the purposes of this action is an agent of the Board of Education of the Westmoreland Central School District.

6. That all of the individually named defendants acted in both their individual and official capacities with respect to the matters conplained (sic) of herein.

7. That the Westmoreland Central School District is a Central School District within the meaning of Article 37 of the Education Law of the State of New York, and, as a supervisory school district, does not have its own superintendent.

8. That plaintiff is an adult residing at 11 Michigan Avenue, Ilion,

New York.

9. That plaintiff is a provisionally certified secondary English teacher. A copy of plaintiff Plano's provisional certificate, marked Exhibit "A", is attached hereto and made part hereof.

10. That by action and majority vote of the Board of Education at a meeting held on June 27, 1972, plaintiff Francis C. Plano was appointed to a probationary period of five years effective July 1, 1972. A copy of such probationary appointment, marked Exhibit "B", is attached hereto and made part hereof.

11. That plaintiff taught in the defendant school district as a probationary secondary English teacher from September 1972 to December 7, 1973.

12. That on or about September 21, 1973, plaintiff attended an in-service workshop on counselling techniques conducted by Joseph Riley, from the Oneida 1-Madison-Herkimer Counties Board of Cooperative Education Services (BOCES) wherein two of the subjects discussed were venereal disease among teenagers and teenage pregnancy. Defendant Baker was in attendance at the same section of the workshop as plaintiff.

13. That on September 24, 1973, plaintiff submitted to his building principal, a Mr. Stanley, a lesson plan including a homework assignment of a composition on the subject of pre-marital sex to be assigned on September 25, 1973. A copy of this lesson plan, marked Exhibit "C", is attached hereto and made part hereof.

14. That on or about Wednesday, September 26, 1973, the Building

Principal, Mr. Stanley, and plaintiff had a conversation regarding his assignment of a home composition on pre-marital sex which had been given as planned; and that the substance of the conversation was that the assignment represented poor judgment on the plaintiff's part.

15. That on or about September 26, 1973, plaintiff was called before defendant Supervising Principal, Baker, who told plaintiff:

> "I want you to know you're through here; I'm asking the Board to fire you Tuesday." [October 2, 1973]

16. That during the fourth period of the school day of September 26, 1973, plaintiff talked with defendant Baker, and in response to plaintiff's asking if his assignment of a composition on pre-marital sex could have been grounds for dismissal, the Supervising Principal replied that it was.

17. That by a request dated September 27, 1973, the Board of Education, through its Clerk, requested that the District Superintendent of Schools terminate plaintiff's probationary period as of November 1, 1973. This request was co-signed by defendant Clifford Baker, Supervising Principal. A copy of this request, marked Exhibit "D", is attached hereto and made part hereof. Said request constitutes a prejudgment respecting plaintiff's discharge on the part of the Board and a bias prohibiting plaintiff from ever being accorded his right to due process in a hearing before the Board.

18. That on October 2, 1973, the defendant F. Wright Johnson, the District Superintendent, recommended that plaintiff's probationary period be terminated according to §§3013, 3031, and 3019-a of the Education Law of the State of New York. A copy of this recommendation, marked Exhibit "E", is

attached hereto and made part hereof.

19. That by notice dated October 3, 1973, plaintiff was notified by defendant Frank R. Melie, Clerk of the Board of Education, that the Board had received a recommendation from defendant District Superintendent of Schools that plaintiff's probationary period be terminated. A copy of this notice dated October 3, 1973, marked Exhibit "F", is attached hereto and made part hereof.

20. That pursuant to the notice marked Exhibit "F", plaintiff Francis C. Plano sent defendant Melie a letter dated October 9, 1973, formally requesting the reasons for such District Superintendent's recommendation of termination. A copy of this letter, marked Exhibit "G", is attached hereto and made part hereof.

21. That by letter dated October 16, 1973, addressed to plaintiff Francis C. Plano, defendants Baker and Johnson noted three reasons for the termination recommendation of defendant District Superintendent of Schools, F. Wright Johnson. A copy of this letter dated October 16, 1973, marked Exhibit "H", is attached hereto and made part hereof.

22. That by letter dated October 24, 1973, from plaintiff Plano to defendant Frank Melie, Clerk of defendant Board of Education, plaintiff notified Melie and the Board of Education that:

> "Due to the vagueness and the seriousness of the charges given, it seems clear that they have a bearing not only on my position at Westmoreland, but on my future employment as well."

In addition the letter requested, that the plaintiff Plano be granted an

opportunity to address the defendant Board to clarify the many misunderstandings surrounding the recommendation of the District Superintendent to terminate plaintiff's employment. A copy of this letter, marked Exhibit "I", is attached hereto and made part hereof. The Board did not permit plaintiff to address it or otherwise provide plaintiff with any manner or kind of hearing prior to or subsequent to his dismissal.

23. That no other or further effort was made by defendant Board of Education or its individual members to provide plaintiff Plano with any additional hearing to clarify, amplify, or explain the reasons for its termination of his employment.

24. That plaintiff attempted to address the Board of Education of the Westmoreland Central School District by an open letter dated November 1, 1973. A copy of this open letter without its attached exhibits, marked Exhibit "J", is attached hereto and made part hereof.

25. That this letter attempted to deal with what plaintiff considered to be the gravamen of the reasons given by defendant District Superintendent through defendant Supervising Principal for the District Superintendent's recommendation for termination.

26. That at a meeting of the defendant Board of Education of the Westmoreland Central School District, held on the 2nd day of November, 1973, plaintiff's probationary period was terminated effective December 7, 1973. A copy of this notice of termination of probationary period, marked Exhibit "K", is annexed hereto and made part hereof.

27. That upon information and belief prior to the Board meeting of

November 2, 1973, to consider the District Superintendent's recommendation of dismissal, the Board, on October 30, 1973 met in executive session to discuss the matter, (See Board release of December 11, 1973, which is attached hereto as Exhibit "M".) and at such time considered plaintiff's moral character and a rumor that plaintiff had taken out and/or dated a ninth grade girl.

28. At no time did defendant Board of Education accede to requests from plaintiff Plano that he be heard before it on the charges made by the District Superintendent of defendant Board of Education.

29. That by an open letter dated November 2, 1973, defendant Board member Howard Walker, expressed the view that the defendant Board's actions had jeopardized plaintiff's career and had denied plaintiff freedom of speech. A copy of this letter dated November 2, 1973, and marked Exhibit "L", is attached hereto and made part hereof.

30. That the defendants and/or their agents, acting individually and in consort have terminated plaintiff's employment, adversely affecting his rights to liberty and property, without according him a prior hearing as required by due process of law.

31. That on or about December 11, 1973, defendant Board of Education issued a public statement regarding Francis C. Plano and its actions toward him. A copy of this statement, marked Exhibit "M", is attached hereto and made part hereof.

32. That by public statement made on or about December 11, 1973, defendent Board of Education acting in consort and individually, stated that it

had considered a "formal complaint" and "several other incidents" concerning plaintiff Francis C. Plano in determining to terminate him.

33. That at no time was plaintiff given an opportunity to either hear or reply to any complaint or incident regarding his employment.

34. That the charges and rumors believed to have been considered by defendants as a basis for terminating plaintiff have materially harmed plaintiff in his profession and reputation, plaintiff's profession and reputation being liberty rights, and their denial subject to due process of law.

35. That plaintiff, by reason of §3013 of the Education Law, the policies and practices of the Board of Education of the Westmoreland Central School District and the State of New York, had a property interest in and a legitimate claim to continued employment as a teacher since he had been appointed for a five year term.

36. That the actions of defendants were taken in violation of this property right, constituting a denial of due process of law.

37. That by requesting of defendant Johnson a recommendation for plaintiff's discharge, the defendant Board members reflected an unconstitutional prior bias against plaintiff destroying the Board impartiality and making a later consideration on November 2, 1973 hopelessly prejudiced.

38. That by failing to give reasons for their actions, defendant Board has precluded judicial review of an administrative action, thus violating due process of law.

39. That defendant Board of Education and/or its agents, acting individually and in consort have denied plaintiff the benefits guaranteed by the First and Fourteenth Amendments to the United States Constitution: namely freedom of speech, and protection of liberty and property rights.

40. That by reason of the "1972-74 Agreement between Supervising Principal and Westmoreland Central School Teachers Association," plaintiff had a contractual interest in the maintenance of his academic freedom to teach. A copy of this contractual right, embodied in Article 30 thereof, marked Exhibit "N", is attached hereto and made part hereof.

41. That defendant[s] by their actions, both individual and in consort, violated and abridged this contractual right, thereby depriving plaintiff of a property right without due process of law.

42. That for exercising his freedom of speech, plaintiff Plano was denied continued employment in defendant Board's School District.

43. That the actions of defendants and/or their agents will have a chilling effect on the freedom of speech and academic freedom of all other members [teachers] within the school district.

44. That by reason of the aforesaid illegal actions of defendants, plaintiff Plano has been deprived of his occupation, livelihood, and liberty without due process of law.

45. That by reason of this deprivation, plaintiff has and will sustain significant monetary loss and loss of professional standing and reputation in the community.

WHEREFORE, plaintiff, Francis C. Plano, respectfully prays that this Court:

1. Assume jurisdiction in this matter;

2. Order defendants to reinstate plaintiff during the pendency of this action, and restrain defendants, their agents, employees, attorneys and others acting in consort therewith from interferring or in any way depriving plaintiff of his rights under due process of law and the First Amendment to the United States Constitution;

3. Issue a preliminary injunction pending a hearing and determination of plaintiff's prayers for permanent relief, to restrain the defendants, their agents, servants, employees, attorneys and all others acting in consort therwith (sic) from in any way unlawfully interferring with the employment rights of plaintiff;

4. Order defendants to reimburse plaintiff Plano for any and all loss of earnings, benefits or other tangibles or intangibles appurtenant to employment as a secondary English teacher in defendant's school district, suffered as a result of the actions taken by the defendants;

5. Enter an order awarding to plaintiff such damages as may be established upon a hearing herein;

6. Allow plaintiff his costs and attorneys fees herein and grant any and all additional relief which this court may deem just and proper.

Plaintiff respectfully prays that the above relief be granted.

DATED: December 19, 1973.
Albany, New York

/s/
BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

JAMES R. SANDNER
IVOR R. MOSKOWITZ
Of Counsel

EXHIBIT A, ANNEXED TO COMPLAINT -
PLAINTIFF PLANO'S PROVISIONAL CERTIFICATE

The University of t

The State Education Dep

PROVISIONAL

This certificate, valid for service in the publ
satisfied the minimum requirements prescribe

Name:	FRANCIS CARL PL
Certification Area:	ENGLISH 7-12
Period of validity:	5 years, effective
Certificate Number:	111426233

Director, Division of Teacher Education

he State of New York

partment

CERTIFICATE

ic schools, is granted to the person named below who has
ed by the State Education Department.

ANO

September 1, 1971

In witness whereof, the Education Department under its seal at Albany, New York, grants this certificate.

Commissioner of Education

(OVER)

EXHIBIT "A"

EXHIBIT B, ANNEXED TO COMPLAINT -
RECORD OF PROBATIONARY APPOINTMENT

First Supervisory District of Oneida County

RECORD OF PROBATIONARY APPOINTMENT

School Westmoreland Central School District No. 1 Town Westmoreland

Name and address of teacher Mr. Francis C. Plano - 11 Michigan Ave., Ilion, N. Y. 13357

Social Security No. 111-42-6233 Teachers retirement system No.

Degrees earned B.A. Tenure area Secondary (English)

N. Y. S. Teacher's certificate No. Issued by New New York State Teacher

Date issued Kind of Certificate (submit copy)

Valid to teach Date for renewal

If teacher does not hold a valid certificate, a completed application for such a certificate must be submitted to the district superintendent of schools with this form.

An uncertified teacher who has filed an application, please submit evaluation and transcript of 6 hours.

Statement by District Principal

In accordance with Section 3013 of the Education Law, I submit herewith the name of the teacher as written above to the district superintendent of schools for recommendation for a probationary appointment to the tenure area indicated. I certify that to the best of my knowledge and belief the above named teacher now holds or is fully qualified to hold a teaching certificate valid to teach in the school district and in the tenure area indicated.

Date 6/22/72 Signed David Cattanach DAVID CATTANACH Principal

Recommendation by District Superintendent of Schools

I recommend the above named teacher for a probationary appointment to the tenure area and in the school district indicated above.

Date June 22, 1972 Signed [signature] Superintendent

Record of Action by Board of Education

By a majority vote of the board of education at a meeting held on (date) 6/27/72 the above named teacher was appointed in the tenure area indicated for a probationary period of 5 years. The starting date for such probationary period is 7/1/72. The teacher has been granted 0 years prior service credit for probationary period. The teacher was placed on step 830 Step 1 of the salary schedule adopted by this board of education on (date) 5/10/71 which said step requires a salary of $ 7977 per year. Contract salary is $ 7977

Date 6/28/72 Signed Frank R. Mello President or Clerk

Acceptance by Teacher

I hereby certify that to the best of my knowledge and belief I am fully qualified for a license under the Laws of the State of New York and the rules and regulations of the State Education Department to teach in the tenure area indicated above in the said school district and I am fully competent to perform the services required under this appointment. I hereby accept the probationary appointment indicated above at the salary step and for the salary indicated.

Date June 28, 1972 Signed Francis C. Plano Teacher

Four copies are to be submitted to the superintendent by the principal. The superintendent will sign and return three copies. After action by the board and acceptance by the teacher the white copy goes to the teacher, yellow copy for school files, pink copy to superintendent.

For the Week Beginning Sept 24 19 72

Basic Skills GRADE SUBJECT 11 & 12

Thesis Statement

Topic Sentences

Paragraphs

Thesis Statement

Topic Sentences

Paragraphs

Basic Skills

EXHIBIT D, ANNEXED TO COMPLAINT -
REQUEST TO DISTRICT SUPERINTENDENT TO
TERMINATE PROBATIONARY PERIOD

REQUEST
TO THE DISTRICT SUPERINTENDENT OF SCHOOLS
THAT PROBATIONARY PERIOD BE TERMINATED

It is the opinion of the Board of Education of

School District #1 Westmoreland

and the chief school administrator that the probationary

period of Francis C. Plano
(name of teacher)

should be terminated as of November 1, 1973
(date)

Date 9/22/73 Signature Laurence R. Melvin
(Clerk of Board of Education)

Date 9/22/73 Signature Clifford Baker
(Supervising Principal)

EXHIBIT E, ANNEXED TO COMPLAINT -
RECOMMENDATION TO THE BOARD OF EDUCATION
THAT PROBATIONARY PERIOD BE TERMINATED

DEPARTMENT OF EDUCATION
FIRST SUPERVISORY DISTRICT
OF ONEIDA, MADISON AND HERKIMER COUNTIES
BOX 233, YORKVILLE, NEW YORK

RECOMMENDATION TO THE BOARD OF EDUCATION THAT PROBATIONARY PERIOD BE TERMINATED

Date October 2, 1973

Board of Education

Westmoreland Central School
School

Westmoreland, New York
Address

I hereby recommend that the probationary period of

Francis C. Plano be terminated ~~effective~~ according to Sections 3013, 3031, and 3019A of the Education Law.
~~the [illegible] day of [illegible], [illegible]~~

The teacher must be given written notice at least 30 days prior to the effective date of such termination of services (Education Law, Section 3019-a).

F. Wright Johnson

F. WRIGHT JOHNSON, District Superintendent of Schools

Prepare three copies of this form. Forward the white copy to the clerk of the Board of Education and the pink copy to the Supervising Principal.

EXHIBIT F, ANNEXED TO COMPLAINT -
NOTICE TO TEACHER THAT PROBATIONARY
PERIOD BE TERMINATED

Westmoreland Central School
Name of School

NOTICE TO TEACHER

OF RECEIPT OF RECOMMENDATION THAT PROBATIONARY PERIOD BE TERMINATED

DATE October 3, 1973

Mr. Francis Plano
Name of Teacher

11 Michigan Ave.
Street

Ilion, New York
City and State

We have received a recommendation from the District Superintendent of Schools that your probationary period be terminated according to Sections 3013, 3031, and 3019A of the Education Law.

The Westmoreland Central School Board of Education shall consider such recommendation at the regular board meeting on November 2, 1973 in Administrative Offices at 5:30 P.M.

Under the new "Fair Dismissal" Law of 1972 a new procedure has been established. It is as follows:

Teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons for such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

Frank R Melie

Frank R. Melie
Clerk of the Board of Education

Prepare three copies of this form. Forward the blue copy to the teacher, the yellow copy to the District Superintendent of Schools, and retain the white copy.

EXHIBIT G, ANNEXED TO COMPLAINT -
LETTER, OCTOBER 9, 1973

11 Michigan Avenue
Ilion, New York 13357
October 9, 1973

Mr. Frank R. Melie
Clerk of the Board of Education
Westmoreland Central School
Westmoreland, New York 13490

Dear Mr. Melie:

I have received a memo from you, dated October 3, 1973, regarding a recommendation to terminate my probationary period. Please consider this a formal request seeking the reasons for such recommendation.

Also, please be advised that the sending of this letter to you in no way is a waiver of my rights to contest either the nature and/or the timeliness of the notification I received and, likewise, such request is no indication of my willingness to waive rights guaranteed to me under the contract of the Westmoreland Teachers Association, other sections of the law of New York State and the United States Constitution.

Very truly yours,

Frank Plano

Frank Plano

EXHIBIT "G"

EXHIBIT H, ANNEXED TO COMPLAINT -
LETTER, OCTOBER 16, 1973

WESTMORELAND CENTRAL SCHOOL DISTRICT

WESTMORELAND, NEW YORK 13490

315/853-6187 315/339-3000

BOARD OF EDUCATION
Micky Roman, President
Barbara Richards, Vice President
John Acar
Cynthia Burns
John Nowak
James Plato
Howard Walker

SUPERVISING PRINCIPAL
Clifford Baker

BUILDING PRINCIPALS
Richard Stanley,
Junior Senior High
Deforest A. Hill,
Elementary

BUSINESS MANAGER/CLERK
Frank R. Mele

October 16, 1973

Mr. Francis Plano
11 Michigan Avenue
Ilion, New York 13357

Dear Mr. Plano:

You have failed to achieve the standards of performance established for Westmoreland Central School, and for the following reasons a recommendation has been made to terminate your services:

1. You have been demanding of and uncooperative with the school administration.

2. You have shown poor judgement in your choice of subjects for assignments and classroom discussion.

3. Efforts on the part of the school administrators to correct your deficiencies through discussions with you have been unsuccessful.

Sincerely,

Clifford Baker

CLIFFORD BAKER
Supervising Principal

CB/jh

Approved:

F. Wright Johnson

F. Wright Johnson
District Superintendent of Schools

EXHIBIT I, ANNEXED TO COMPLAINT -
LETTER, OCTOBER 24, 1973

11 Michigan Avenue
Ilion, New York 13357
October 24, 1973

Mr. Frank Melie
Clerk of the Board of Education
Westmoreland Central School
Westmoreland, New York 13490

Dear Mr. Melie:

This is to acknowledge your letter dated October 16, 1973, which set forth the reasons for the recommendation to terminate my services at the Westmoreland Central School.

Due to the vagueness and the seriousness of the charges given, it seems clear that they have a bearing not only on my position at Westmoreland, but on my future employment as well. It seems in all fairness, therefore, that this matter be carefully considered by all parties involved. I am confident that after I have had the opportunity to address myself to the Board, many misunderstandings surrounding this matter will be clarified. I request that my address to the Board of Education be made privately (in Executive Session) rather than in public.

Thank you for your time and consideration.

Sincerely yours,

Frank C. Plano

Frank C. Plano

cc: Members of the
Board of Education

EXHIBIT J, ANNEXED TO COMPLAINT -
OPEN LETTER TO SCHOOL BOARD,
NOVEMBER 1, 1973

OPEN LETTER TO THE

BOARD OF EDUCATION

Westmoreland Central School
November 1, 1973

Frank C. Plano
Teacher of English

EXHIBIT "J"

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October 31, 1973

Board of Education
Westmoreland Central School

Members of the Board:

While I have answered in the accompanying letter the stated reasons for the recommendation to terminate my services, I would like to confront directly several unstated issues which I fear may be influencing the Board unnecessarily:

WHAT'S BEING SAID

1. SWEARING

Last spring I was told on one occasion that I might have accidentally sworn in class. Since that time I have been very careful in my usage and have had no reoccuring incidents.

2. NINETH-GRADE STUDENT

Last spring it was falsely rumored to the Board that I had dated a nineth-grade Westmoreland girl. This is just not true. In fact, I was never even told who the girl might be! If any member of the Board allows such rumors to influence his decision concerning my termination, he at the same time condemns an innocent girl. Please take this opportunity to dispell any such lingering doubts.

3. NEWSPAPER

I have heard that some Board members still question whether my concern for the school newspaper was selfishly motivated.

1. First, I did request finances for the paper, but none for salary.
2. Secondly, it is foolish to believe that I would gain anything by "rablerousing" students. Such moves could only hurt any adult involved.

3. Thirdly, nothing printed could be released without the principal's approval. Clearly there is nothing to gain here save helping students to write better, which is my profession.

4. OUTSPOKENNESS AT FACULTY MEETINGS

I have always thought it was policy to come to faculty meetings prepared to discuss issues on the Principal's agenda. At times I have spent nearly two hours preparing written suggestions on agenda topics such as "Our Teaching Philosophy" and "Goals for this School". I am sorry to learn that such eagerness to be prepared has been interpreted as a regetic quality.

11 Michigan Avenue
Ilion, New York 13357
October 31, 1973

Members of the Board of Education
Westmoreland Central School
Westmoreland, New York 13490

Madame President, Members of the Board:

No man thinks more highly than I do of this educational institution; furthermore no man is more aware of the awful responsibilities of those who must administer such an institution. The administrator's position is never easy; at best it is a thankless job, expecially when the futures of so many individuals hang in the balance, and perhaps we would do well to remember the tremendous pressure of the job itself.

Yet different men involved in a common goal often see the same subject in different lights; and I therefore hope that it will not be thought disrespectful if I state my present sentiments freely and without reserve. This is no time for ceremony. The question before us tonight may influence not only a position, but an entire career, and it will most surely effect the atmosphere of this institution for some time to come. I pray, then, that you will listen to what I have to say with an open mind; and that you will then judiciously hand down a decision which is fair based upon the facts as you see them.

The reasons for the recommendation to terminate my services at Westmoreland have been stated to me as follows:

"1. You have been demanding of and uncooperative with the school administration.

2. You have shown poor judgment in your choice of topics for assignments and classroom discussions.

3. Efforts on the part of the administrators to correct your deficiencies through discussions have been unsuccessful."

UNCOOPERATIVE WITH THE SCHOOL ADMINISTRATION

Since the day I entered Westmoreland I had never thought, nor had I ever been told before September 25th of this year, that I had been uncooperative with anyone. Rather, I have tried in every way I know how to cooperate fully with all concerned with this school.

I thought I was cooperative when: I spent seven weeks last winter taking a $250 non-credit speed reading course at my expense, so that I could better teach a similar course at Westmoreland.

I thought I was cooperative when: I introduced a new remedial reading course into the English curriculum this fall.

I thought I was cooperative when: I accepted the extra position as junior high wrestling coach last winter, and I later accepted an assistant track coach position in the spring and when I substituted as girls' soccer coach this fall when the coach could not be present for their last game and would have had to cancel had she not found someone to take her place.

I thought I was cooperative when: I have worked at basketball games, taken tickets at a football game, and chaperoned dances at Westmoreland, all without the usual financial reinbursement.

I thought I was cooperative when: Scheduling problems meant that several students couldn't be placed in regular classes, I accepted a seventh assignment for the semester. Although such an arrangement was clearly in excess of contract regulation, I thought the welfare of these students and an atmosphere of mutual cooperation were more important, thus I taught the course.

I thought I was cooperative when: I gave up my lunch hour to take another extra class last spring.

These acts were not originally conducted to provide later evidence of my cooperation; they were merely actis of one who is willing to help and eager to do his best in the profession of teaching. And from this vantage point, I do not understand the accusation that I am unwilling to cooperate with this school.

POOR JUDGMENT

Now, the second charge I face here is that of poor judgment is assigning topics for papers and class discussions.

I have tried very hard to be judicious in my teaching. As far as possible I have tried to individualize my teaching assignments so that each pupils' needs are met, his capabilities are recognized, and the motivation which would produce maximum results are supplied. I try to be fair, and yet I try to know the limitations and individual differences of each of my pupils and then work them to their potentials.

This is not an easy job, but I have been continuously told, in each of my evaluations and observations, that I have been doing satisfactory or above average work - that my lessons were carefully prepared, discipline good, and my assignments adequate. In fact, my latest observation had occurred only a week before September 25th, and I was told of my satisfactory performance at this time. Consequently, the accusation of poor judgment, save an incident late in September, came to me as quite a surprize.

Now, this particular assignment, which seems to have caused so much disturbance, can be explained, I believe, in the light of some important circumstances surrounding the assignment.

ADMINISTRATION INSERVICE DAY

First it is important to note that on the preceeding Friday, at an inservice day sponsored by the administration, BOCES personnel presented to the Westmoreland faculty a program covering several topics including teenage pregnancy, and venereal disease. It was stated that veneral disease has reached epidemic proportions among youth, and that teenage pregnancy is a number one cause for dropouts among high school girls. The inference of the session, was that teachers should provide an atmosphere in which such topics could be considered, and views aired so that teen-agers could make important decisions for themselves.

Thus, my assignment the following week, which coincided with my major objectives of writing good sentences, was in no way an attempt to influence students on any subject; but was to allow them to state their own opinions that I might be more aware of the atmosphere of their values. I thought that this was the type of concern suggested by the inservice day.

Yet, sometimes our concern comes too late, for a week later one of my students, obviously confused and worried, confided to me that his firl friend was pregnant. Perhaps if I had all spent a little more time listening before, perhaps if we all had, such tragedy could have been avoided.

I recognize that I am no savior of youth; I have made mistakes in the past; this one, perhaps, was in judgment. Yet, who among us has not? Surley you can see from the circumstances at hand the good intentions of this assign--ment.

ASSIGNMENT OK'D - Further, I did not anticipate any problems with this assignment because my lesson plans were handed into the high school principal a full day before this assignment was given, and no objections were made to the topic given.

Consequently, I was very surprised to learn of the drastic reprisals taken against one on the very next day. Do man's good intentions warrent such actions? I believe that as reasonable men you would not think it so.

CORRECT DEFICIENCIES

Finally, there remains the question whether I have been willing to listen to the advise of others during consultations. To this statement I can only respond that I have tried actively, since my arrival at Westmoreland, to solicit suggestions from my department chairman, from my principal, and from my more experienced co-workers. I have listened, followed advice, and been continuously reassured that my performance at Westmoreland was satisfactory.

If there has been serious discontent about my work, I have not been told about it; nor have I been told of faulty assignments, poor judgment, or lack of cooperation.

If anyone here tonight has been aware of such charges, why was I never told? I assure you I am not only willing to listen but I am eager to learn. For you see, the most important thing in my life has been my desire to be a good teacher, and I welcome all the help I can get. I'm sure that is the type of attitude you would like from your teachers, and it is the attitude I demand from myself.

Madame President, Ladies and Gentlemen of the Board:

It becomes more and more apparent to me that what we have here is a failure to communicate. This particular case, which evidently abounds in misunderstandings, is not a cause, but a victim of tragic victim of such a breakdown.

What it seems we need most here is a reestablishment of relations, a building of trust and confidence between all parties involved. The Board stated in its recent letter to the Faculty that you are all dedicated individuals trying to give your best to this community. I believe you. For I, to, am a dedicated individual trying to give my best to this community. I, as you, have come more to share of myself than take for myself; and I, as you, have come more to serve than be served.

I have sincerely done my best to become an excellent teacher in Westmoreland. Please remember that of all the accusations made, there has been no criticism of my abilities as a teacher. Yet, in my eagerness to do what I believed you wanted from me, it is possible that I have made some errors. I can only ask whether such eagerness warrents my immediate termination in mid semester.

Sincerely yours,

Frank C Plano

Frank C. Plano

EXHIBIT K, ANNEXED TO COMPLAINT -
NOTICE TO TEACHER OF TERMINATION
OF PROBATIONARY PERIOD

Westmoreland Central School
Name of School

NOTICE TO TEACHER
OF TERMINATION OF PROBATIONARY PERIOD

Date November 5, 1973

Francis Plano
Name of Teacher

11 Michigan Avenue
Street

Ilion, New York
City and State

After receipt of the recommendation of the District Superintendent of Schools, at a meeting of the Board of Education of the Westmoreland Central School District, held on the 2nd day of November, 19 73, your probationary period was terminated effective on the 7th day of December, 19 73.

Frank R Melie
Frank R. Melie
Clerk of the Board of Education

Prepare three copies of this form. Forward the blue copy to the teacher, the yellow copy to the District Superintendent of Schools, and retain the white copy.

EXHIBIT L, ANNEXED TO COMPLAINT -
OPEN LETTER FROM HOWARD WALKER, November 2, 1973
NOVEMBER 2, 1973

One of the areas of concern of this Board of Education has centered around the topic of conformity. It seems to be, if I'm accurate in my assessment , the feeling of the Board that students have too long been asked to conform to antiquated standards and are not allowed to express their individual unique qualities and abilities. We degrade unecessary conformity and condone reasonable freedom of expression.

I find it deplorable that we should operate this school using such discriminatory standards. We encourage freedom of expression from our students and in the same breath ostracize teachers who have the courage to be different, to express their views and demonstrate the firmness of their convictions.

It is my own feeling that we should encourage all individuals to express themselves in their own unique way within the framework society has established. I feel Mr. Plano has done this and should not have his professional career jeopardized. I also feel that Mr. Frank Plano has been an individual who felt strong enough about his convictions to stand up and express his feelings even though it did not conform to expected behavior. How will we ever teach young people to express themselves if we won't permit our professional educators to do the same?

I would like to go on record as commending Mr. Plano for the job he has done here at Westmoreland and it is my fervent wish that this experience does not force him to waver from his convictions.

Howard Walker

Howard Walker

EXHIBIT M, ANNEXED TO COMPLAINT -
PUBLIC STATEMENT FROM BOARD OF EDUCATION,
DECEMBER 11, 1973

December 11, 1973

There has been much misinformation circulated regarding the termination of employment of a former Westmoreland probationary teacher and the procedure followed.

The Board of Education takes this opportunity to summarize the process and its actions.

The supervising principal and the high school principal received a formal complaint regarding an assignment given to the students by the teacher. Upon investigation, it was found that the complaint had merit. The high school principal and the supervising principal met with the teacher, and the teacher was given full opportunity to justify his actions.

The supervising principal, after reviewing with the high school principal the documentation of several other incidents involving this teacher in the 1972-73 school year, submitted an opinion to the district superintendent of schools that the services of the teacher should be terminated. The supervising principal provided documentation for the district superintendent, and the district superintendent recommended that the probationary period of the teacher be terminated according to Sections 3013, 3031, and 3019A of the Education Law.

On October 3, 1973, the teacher was given a notice that the Board of Education had received a recommendation that his probationary period be terminated, and that the Board would consider this recommendation at a meeting on November 2, 1973. The notice to the teacher included the new procedure as established by the Fair Dismissal Law of 1972 as follows:

ONLY COPY AVAILABLE

"Teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher may not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons for such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting."

The teacher was notified on October 3, 1973, 30 days prior to the board meeting.

The teacher did request within 21 days in writing the reasons for such recommendation. This request was received October 10, 1973.

He was furnished within 7 days thereafter, on October 17, 1973, the reasons in a written statement

On October 26, 1973, the district clerk received a letter from the teacher asking for a hearing with the Board.

The teacher did not file a written response to the reasons with the district clerk 7 days prior to the board meeting.

The Board met in work session on October 30, 1973 in order to thoroughly discuss this matter prior to the November 2 meeting.

The teacher delivered to each board member a written response on November 1, 1973, 1 day before the board meeting and spoke individually with some members of the Board. The district clerk did not receive a copy from the teacher.

The Board met and voted on November 2, 1973 to terminate the probationary period of the teacher effective December 7, 1973.

Notice of termination of probationary period was given to the teacher on November 5, 1973.

The Board would like to point out that there is no authorization in the law whereby it is allowed to hold a hearing as part of the process for the termination of a probationary teacher's employment.

Even though the teacher did not meet the requirement of the law in filing his response, the Board members had available his response as noted above and used this information in reaching their decision.

The Board of Education has received numerous communications both pro and con in regard to its action. All such communications were received by the Board.

The teacher's probationary period has been terminated, and he now has legal recourse if he desires to use it.

EXHIBIT N, ANNEXED TO COMPLAINT -
1972-74 AGREEMENT BETWEEN SUPERVISING PRINCIPAL AND
WESTMORELAND CS TEACHERS ASSOCIATION, ARTICLE 30 - ACADEMIC FREEDOM

ARTICLE 30

Academic Freedom

1. The maintenance of a climate of intellectual freedom is fundamental to the preservation of the learning process in a democratic system and to living in a world of ever increasing complexity. Decisions concerning potential or actual infringements on intellectual freedom can best be made by open communication among all school district personnel. The quality of teaching depends upon the individual teacher's freedom to make classroom decisions (within the broad framework of state statutes, board of education policy, and administrative regulations) which can best develop individual student talents.
2. The professional staff shall be involved by the administration in determining (for recommendation to the board of education) the curriculum, its objectives, and its content.
3. The parties affirm that in accordance with the laws of the state, a teacher's religious, political, social, and economic beliefs shall not be cause for dismissal provided they do not interfere with his responsibilities as a teacher and his professional integrity.
4. Controversial teaching material shall not be withheld from a teacher without providing the teacher reasons therefor and without providing the teacher an opportunity to express his thoughts on the material prior to the decision.
5. The public school teacher is a citizen, a member of a profession, and a professional employee. When he speaks or writes as a citizen, he shall be free from institutional censorship or discipline. However, his special position in the community imposes special obligations. As a person of learning and a member of the teaching profession, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, As individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

NOTICE OF MOTION

Civil Action

No. 73-CV-562

To Defendants:

The Board of Education
Westmoreland Central School District
Westmoreland Junior-Senior High School
Westmoreland, New York 13490

Howard Walker
R.D. #2, Daily Road
Rome, New York 13440

Mickey Romeo
6961 Norton Avenue
Clinton, New York 13323

Barbara Richards
R.D. #2, Route 233
Rome, New York 13440

James G. Plehn
Main Street
Westmoreland, New York 13490

Clifford W. Baker
Creaser Road
Westmoreland, New York 13490

John A. Nowak
Clark Mills Road
R.D. #1
Whitesboro, N.Y. 13492

Frank R. Melie
4725 1/2 French Road
Clark Mills, N.Y. 13321

F. Wright Johnson
2868 Oneida Street
Sauquoit, N.Y. 13456

Cynthia Barns
7186 Cooper Street
Westmoreland, N.Y. 13490

John Acee
Stop Seven Rd., R.D. 1
Whitesboro, N.Y. 13492

PLEASE TAKE NOTICE that the undersigned will bring the annexed motion for a temporary restraining order and a preliminary injunction on for hearing before the Hon. James T. Foley, U.S. District Court, Federal Post Office Building, City of Albany, on the 21st day of January 1974, at 10 o'clock in the forenoon of that date or as soon thereafter as counsel can be heard.

BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

JAMES R. SANDNER
IVOR R. MOSKOWITZ
Of Counsel

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO. Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, As Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION Civil Action No. 73-CV-562

Upon the complaint and the annexed affidavit, Francis C. Plano, the plaintiff, moves the Court as follows:

1. To issue a temporary restraining order restraining all defendants from refusing to reinstate petitioner to his position of secondary English teacher in defendant Board's school district, and restraining defendant Board of Education, it's agents, attorneys or others named as defendants in this complaint from interfering in any way with plaintiff's performance of his teaching duties in said school district, pending the hearing and determination of the preliminary injunction sought hereinafter in this motion.

2. To issue a preliminary injunction restraining the defendants, their agents, servants, employees, attorneys and all others acting in concert therewith from terminating the employment of plaintiff or from institu-

ting or undertaking any proceedings whatsoever to terminate plaintiff during the pendency of this motion for a preliminary injunction.

3. The grounds of this motion, as more fully set forth in the Complaint and the annexed Affidavit of Francis C. Plano are that:

A. That defendants acting individually and/or in concert have deprived plaintiff of a property interest in his employment by terminating him without a prior hearing on grounds which deny plaintiff due process of law.

B. That defendants acting individually and/or in concert have deprived plaintiff of a "liberty interest" in his professional standing, opportunities for future employment, and personal reputation, on grounds and in such a manner as to violate plaintiff's right to due process of law.

C. That defendants acting individually and/or in concert have denied plaintiff his right to freedom of speech as guaranteed by the First Amendment to the United States Constitution.

D. That the actions of defendants acting individually and/or in concert will and are having a chilling effect upon the First Amendment freedoms enjoyed by teachers within defendant Board's school district.

E. That the loss of liberty and property rights as well as the denial of First Amendment freedoms have caused irreparable injury to plaintiff, which cannot be rectified even by final judgment for plaintiff.

F. That plaintiff's Complaint demonstrates probable success on the merits.

G. That plaintiff's Complaint demonstrates the presence of serious questions going to the merits which warrant further investigation and trial.

H. That no injury will be sustained by the defendants or the public through issuance of a temporary restraining order and preliminary injunction, and that the balance of hardships tips decidedly toward plaintiff.

I. That this Court grant such other, further and different relief as may be deemed just and proper.

/s/ Bernard F. Ashe
BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York - 12205
Tel. No. (518) 459-5400

JAMES R. SANDNER
IVOR R. MOSKOWITZ
Of Counsel

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	:	AFFIDAVIT Civil Action No. 73-CV-562

STATE OF NEW YORK)
COUNTY OF) ss.:

FRANCIS C. PLANO, being duly sworn, deposes and says:

1. That deponent is the plaintiff herein and makes this affidavit in support of his motion for a temporary restraining order and preliminary injunction pending the determination of the action referred to above.

2. That deponent is presently a provisionally certified secondary English teacher.

3. That by action and majority vote of defendant Board of Education, at a meeting held on June 27, 1972, deponent was appointed to a probationary period of five years effective July 1, 1972. A copy of such probationary appointment, marked Exhibit "D" is attached to the Complaint in this matter.

4. That deponent taught in the defendant Board's school district as a secondary English teacher from September, 1972 until December 7, 1973.

5. That after assigning a homework assignment consisting of a composition on the subject of student attitudes toward premarital sex, deponent was told by defendant Supervising Principal, Clifford Baker, that he was going to recommend that defendant Board fire deponent.

6. That during a period of the school day of September 26, 1973, deponent spoke with defendant Baker in requesting whether deponent's assignment of a composition on premarital sex could have been grounds for his dismissal; and the Supervising Principal replied in the affirmative.

7. That defendant Board of Education, through its Clerk, requested that the District Superintendent of Schools recommend termination of deponent's probationary appointment as of November 1, 1973.

8. That on October 2, 1973, defendant Johnson, District Superintendent, recommended that deponent's probationary appointment be terminated.

9. That by notice dated October 3, 1973, deponent was notified by defendant Clerk of the Board of Education, Frank R. Melie, that defendant Board had received a recommendation from defendant District Superintendent that deponent be terminated.

10. That by letter dated October 9, 1973, deponent formally requested the reasons for such District Superintendent's recommendation of termination.

11. That by letter dated October 16, 1973, defendants Baker and Johnson noted three reasons for deponent's termination. A copy of this letter, marked Exhibit "H" is attached to the Complaint.

12. That by letter dated October 24, 1973, deponent told defendant Frank Melie, Clerk of defendant Board of Education:

> "Due to the vagueness and seriousness of the charges given, it seems clear that they have a bearing not only on my position at Westmoreland, but on my future employment as well."

In addition, deponent requested that he be granted an opportunity to address defendant Board to clarify the many misunderstandings surrounding the recommendation of the District Superintendent to terminate deponent's employment.

13. That although deponent made requests of defendant Board, the Board did not permit deponent to address it in any manner or in any form.

14. That no other effort was made by defendant Board or its individual members to provide deponent with a hearing to clarify, amplify, or explain the reasons for their termination of his employment.

15. That at a meeting of the defendant Board of Education of the Westmoreland Central School District, held on the 2nd of November, 1973, deponent's employment was terminated effective December 7, 1973.

16. That upon information and belief, prior to defendant Board's meeting of November 2, 1973, the Board met on October 30, 1973 in executive session to discuss deponent's termination; and that at such time defendant Board considered deponent's character and a rumor that deponent had dated a ninth grade girl.

17. That by open letter dated November 2, 1973, defendant Board Member, Howard Walker, expressed the view that the defendant Board's actions had jeopardized deponent's career and had denied deponent freedom of speech. A copy of this letter dated November 2, 1973, marked Exhibit "L", is attached to the Complaint.

18. That on information and belief defendant Board of Education considered several complaints and other incidents unknown to deponent in making their decision to terminate deponent.

19. That the charges and rumors considered by defendant Board and

utilized by them for terminating deponent have materially harmed deponent in his professional and personal reputation, as well as in his local community.

20. That by reason fo the "1972-74 Agreement Between Supervising Principal and Westmoreland Central School Teachers Association," deponent had a contractual right in the maintenance of his academic freedom to teach. This right was specifically guaranteed by the above collective agreement.

21. That all defendants, acting individually and in concert abridged this deponent's contractual, statutory and property rights by their actions, without due process of law.

22. That for exercising deponent's freedom of speech, deponent was denied employment in defendant Board's school district.

23. That deponent has been deprived of his occupation, livelihood and liberty without due process of law.

24. That defendants' summary actions in terminating deponent from his employment in the middle of the school term will cause and have caused immediate and irreparable injury in that they have cast a stain upon his professional record which will hamper him in attempts to find other and further employment within his field, in that they have harmed deponent irreparably by casting aspersions upon deponent's professional, personal and moral reputation in his community and within his profession for which there is no adequate remedy at law.

25. That upon information and belief, neither the defendants nor the public will be injured by the issuance of a temporary restraining order and preliminary injunction in that deponent has always been rated a satisfactory teacher, and in that there is no conceivable harm to be done to either defendants or students by reason of temporary reinstatement.

26. That deponent is presently unemployed, and because of this controversy has found it difficult to find other teaching positions or other suitable employment.

27. That deponent has read the Complaint filed herein and states that the factual allegations contained therein are true and incorporated herein by reference.

/s/ Francis C. Plano
FRANCIS C. PLANO

SUBSCRIBED AND SWORN to before me
this 8th day of January, 1974.

/s/ Ivor R. Moskowitz
Notary Public

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central Scool District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	ANSWER Civil Action No. 73-CV-562

The defendants Clifford W. Baker, Frank R. Melie, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo and Howard Walker, as individuals, through their attorneys, Evans, Severn, Bankert & Peet, Esqs., for their Answer to Plaintiff's Complaint:

1. ADMIT the allegations contained in Plaintiff's Complaint marked and numbered paragraphs 2, 3, 4, 10, 11, 18, 19, 20, 21 and 26.

2. ADMIT those allegations contained in Plaintiff's Complaint marked and numbered paragraph 17 which state that Exhibit "D" was co-signed by Defendant Clifford W. Baker but DENY each and every other allegation in said paragraph contained.

3. ADMIT the allegations contained in Plaintiff's Complaint marked

and numbered 27, except DENY that "at such time considered Plaintiff's moral character and a rumor that Plaintiff had taken out and/or dated a ninth-grade girl."

4. ADMIT the allegation contained in Plaintiff's Complaint marked and numbered 31 that a statement was issued on or about December 11, 1973, marked Exhibit "M" of Plaintiff's Complaint, but DENY each and every other allegation in said paragraph contained.

5. ADMIT upon information and belief the allegations contained in Plaintiff's Complaint marked and numbered paragraph 5, except DENY the last sentence of said paragraph.

6. ADMIT upon information and belief the allegations contained in Plaintiff's Complaint marked and numbered paragraphs 7, 8 and 9.

7. With regard to the allegations contained in Plaintiff's Complaint marked and numbered paragraph 27, Defendants ADMIT (except Defendant Baker who admits upon information and belief) the allegations contained therein, except that all Defendants DENY the last sentence of said paragraph.

8. DENY those allegations in Plaintiff's Complaint marked and numbered paragraphs 1, 6, 16, 23, 28, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

9. DENY knowledge or information sufficient to form a belief as to the allegations contained in Plaintiff's Complaint marked and numbered paragraphs 12, 13, 14, 24, 25 and 29, and therefore DENY same.

10. Defendant Baker DENIES the allegations in Plaintiff's Complaint marked and numbered paragraph 15, and all other Defendants DENY knowledge or information sufficient to form a belief as to those allegations, and therefore DENY same.

FOR A FIRST SEPARATE AND DISTINCT DEFENSE

11. Defendants allege that the Plaintiff has failed to exhaust his administrative and judicial remedies including but not limited to Section 310(4) of the Education Law of the State of New York and Article 78 of the Civil Practice Law and Rules of the State of New York, which said remedies have heretofore been and at all times are still available to him.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

12. That the Defendants acted reasonably and in accord with all mandates set forth pursuant to Sections 3031, 3013(1)(a) and 3019a, in addition to all other legal mandates pursuant to the laws of the State of New York, with respect to any and all transactions set forth in Plaintiff's Complaint.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

13. Plaintiff has failed to set forth sufficient facts in his Complaint to raise a Federal question or any other issue recognizable by this Court.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

14. That any and all other rights which Plaintiff has claimed, he has in fact voluntarily waived.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

15. Plaintiff has failed to follow statutory procedure set forth by the applicable laws of the State of New York to prosecute any cause of action which he may have deemed to exist against the School Board by his failure to comply with Section 3813 of the Education Law of the State of New York.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

16. That the Complaint fails to state facts sufficient to state a cause of action.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

17. That the Plaintiff has pursued an administrative remedy available to him under the Westmoreland Teachers Association agreement with the Supervising Principal and has filed for reinstatement and redress thereunder and that this action has not been concluded and is still pending.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

18. That no cause of action has been stated against the individual defendants, and they should be dismissed as improper parties.

WHEREFORE, Defendants pray that the Complaint herein be dismissed and for such other and further relief as to the Court may seem just and proper.

EVANS, SEVERN, BANKERT & PEET
Attorneys for Defendants
Clifford W. Baker, Frank R. Melie, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo and Howard Walker
Office and Post Office Address:
301 Mayro Building
Utica, New York 13501
(315) 724-4151

TO: BERNARD F. ASHE, ESQ.
Attorney for Plaintiff
Office and P.O. Address:
80 Wolf Road
Albany, New York 12205

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

ANSWER

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

The defendants Clifford W. Baker, as Supervising Principal of Westmoreland Central School District, Frank R. Melie, as Clerk of the Board of Education of Westmoreland Central School District, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo and Howard Walker, as members of the Board of Education of the Westmoreland Central School District, and the Board of Education of the Westmoreland Central School District, through their attorney, Michael P. DeSantis, Esq., for their Answer to Plaintiff's Complaint:

1. ADMIT the allegations contained in Plaintiff's Complaint marked and numbered paragraphs 2, 3, 4, 10, 11, 18, 19, 20, 21 and 26.

2. ADMIT those allegations contained in Plaintiff's Complaint marked

and numbered paragraph 17 which state that Exhibit "D" was co-signed by Defendant Clifford W. Baker but DENY each and every other allegation in said paragraph contained.

3. ADMIT the allegations contained in Plaintiff's Complaint marked and numbered 27, except DENY that "at such time considered Plaintiff's moral character and a rumor that Plaintiff had taken out and/or dated a ninth-grade girl."

4. ADMIT the allegation contained in Plaintiff's Complaint marked and numbered 31 that a statement was issued on or about December 11, 1973, marked Exhibit "M" of Plaintiff's Complaint, but DENY each and every other allegation in said paragraph contained.

5. ADMIT upon information and belief the allegations contained in Plaintiff's Complaint marked and numbered paragraph 5, except DENY the last sentence of said paragraph.

6. ADMIT upon information and belief the allegations contained in Plaintiff's Complaint marked and numbered paragraphs 7, 8 and 9.

7. With regard to the allegations contained in Plaintiff's Complaint marked and numbered "40", Defendants ADMIT the 1972-74 agreement between the Supervising Principal and the Westmoreland Teacher's Association and ADMIT that Article 30 is a part thereof and further ADMIT that Plaintiff has a right to pursue any grievance he may have or be entitled to thereunder under the grievance procedure set forth therein, but that Defendants DENY each and every other allegation or conclusion in said paragraph contained.

8. With regard to the allegations contained in Plaintiff's Complaint marked and numbered paragraph 22, Defendants ADMIT (except Defendant Baker who admits upon information and belief) the allegations contained therein,

except that all Defendants DENY the last sentence of said paragraph.

9. DENY those allegations in Plaintiff's Complaint marked and numbered paragraphs 1, 6, 16, 23, 28, 30, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44 and 45.

10. DENY knowledge or information sufficient to form a belief as to the allegations contained in Plaintiff's Complaint marked and numbered paragraphs 12, 13, 14, 24, 25 and 29, and therfore DENY same.

11. Defendant Baker DENIES the allegations in Plaintiff's Complaint marked and numbered paragraph 15 and all other Defendants DENY knowledge or information sufficient to form a belief as to those allegations and therefore DENY same.

FOR A FIRST SEPARATE AND DISTINCT DEFENSE

12. Defendants allege that the Plaintiff has failed to exhaust his administrative and judicial remedies including but not limited to Section 310 (4) of the Education Law of the State of New York and Article 78 of the Civil Practice Law and Rules of the State of New York, which said remedies have heretofore been and at all times are still available to him.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

13. That the Defendants acted reasonably and in accord with all mandates set forth pursuant to Sections 3031, 3013(1)(a) and 3019a, in addition to all other legal mandates pursuant to the laws of the State of New York, with respect to any and all transactions set forth in Plaintiff's Complaint.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

14. Plaintiff has failed to set forth sufficient facts in his Complaint to raise a Federal question or any other issue recognizable by this Court.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

15. That any and all other rights which Plaintiff has claimed, he has in fact voluntarily waived.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

16. Plaintiff has failed to follow statutory procedure set forth by the applicable laws of the State of New York to prosecute any cause of action which he may have deemed to exist against the School Board by his failure to comply with Section 3813 of the Education Law of the State of New York.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

17. That the Complaint fails to state facts sufficient to state a cause of action.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

18. That the Plaintiff at all times herein mentioned was a probationary teacher and subject to the provisions of the Education Law of the State of New York applicable thereto.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

19. That the Defendants may, acting in conformity with the laws made and provided therefor, terminate the employment of a probationary teacher. That the Plaintiff had not been employed for a sufficient period of time to attain tenure. That the Defendants were guided by the standard of what is best for the School and its educational objectives and for its students.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

20. That the Plaintiff has pursued an administrative remedy available to him under the Westmoreland Teachers Association agreement with the Supervising Principal and has filed for reinstatement and other redress thereunder and that this action has not been concluded and is still pending.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

21. That the Complaint fails to state grounds upon which the Court's jurisdiction depends.

FOR A FURTHER SEPARATE AND DISTINCT DEFENSE

22. That the Defendant Board of Education of the Westmoreland Central School District is not a person within the meaning of 42 U.S.C. Sec. 1983. That such defendant/upon information and belief [sic] is such a Municipal Corporation that enjoys common law immunity and the protection of sovereign immunity.

Defendants demand and request trial by jury on any and all issues therefor appropriate.

WHEREFORE, Defendants pray that Plaintiff's Complaint be dismissed on the merits.

DATED: January 14, 1974.

/s/ Michael P. DeSantis, Esq.
MICHAEL P. DeSANTIS, ESQ.
Attorney for Defendants
Office and Post Office Address:
709-10 First National Bank Bldg.
Utica, New York 13501

TO: BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	ANSWER 73-CV-562

Defendant, F. Wright Johnson, Individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties as and for his Answer, herein:

1. Admits the allegations contained in paragraphs numbered 2,3,4,7, 9,10,18,21 and 26 of the Complaint.

2. Admits that the defendant, F. Wright Johnson, as District Superintendent of Oneida 1 - Madison-Herkimer Counties is an employee of the Commissioner of Education of the State of New York and is the District Superintendent of respondent Board's school district for purposes of the Education Law of the State of New York as set forth in paragraph 5 of the Complaint. Said defendant denies, however, that he is an agent of the Board of Education of the Westmoreland Central School District as set forth in said paragraph 5 of the Complaint.

3. Denies knowledge of sufficient information to form a belief as to the allegations contained in paragraphs numbered 8,12,13,19,20,22,23, 24,25,28,29,31,32,33 and therefore denies same.

4. Denies the allegations set forth in paragraphs number 1,5,6,11, 14,15,16,17,27,30,34,35,36,37,38,39,40,41,42,43,44 and 45 of the Complaint.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE

5. Defendant alleges that the plaintiff has failed to exhaust his administrative and judicial remedies including but not limited to Section 310(4) of the Education Law of the State of New York and Article 78 of the Civil Practice Law and Rules of the State of New York, which said remedies have heretofore been and at all times are still available to him.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE

6. That defendant Johnson acted reasonably, in good faith and within the scope of and pursuant to his duties and powers under Sections 2215, 3013 and 3031 of the Education Law of the State of New York.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE

7. That the Court has no jurisdiction for the reasons that the action is between citizens of the same state, the amount actually in controversy is less than Ten Thousand Dollars ($10,000.00), exclusive of interest and costs and presents for determination no question arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal District Court.

FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE

8. That any and all other rights which plaintiff has claimed, he has in fact voluntarily waived.

FOR A FIFTH, SEPARATE AND DISTINCT DEFENSE

9. Plaintiff has failed to follow statutory procedure set forth by the applicable laws of the State of New York to prosecute any cause of action which he may have deemed to exist against the School Board by his failure to comply with Section 3813 of the Education Law of the State of New York.

FOR A SIXTH, SEPARATE AND DISTINCT DEFENSE

10. The Complaint fails to state a claim against defendant Johnson individually or as District Superintendent of Schools upon which relief can be granted.

FOR A SEVENTH, SEPARATE AND DISTINCT DEFENSE

11. That the plaintiff at all times herein mentioned was a probationary teacher and subject to the provisions of the Education Law of the State of New York applicable thereto.

FOR AN EIGHTH, SEPARATE AND DISTINCT DEFENSE

12. That said defendant Johnson acting as Superintendent of Schools has no power or authority to terminate the employment of the plaintiff and did not do so but merely recommended to the Board of Education that plaintiff be dismissed from his position. That said defendant Johnson may in his discretion recommend the termination of a probationary teacher and that the plaintiff did not have tenure and was in fact a probationary teacher.

FOR A NINTH, SEPARATE AND DISTINCT DEFENSE

13. That the plaintiff has pursued an administrative remedy available to him under the Westmoreland Teachers Association agreement with the School District and has filed for reinstatement and other redress thereunder and that this action has not been concluded and is still pending.

FOR A TENTH, SEPARATE AND DISTINCT DEFENSE

14. The State of New York has not been joined in this action and is a party who must be joined in this action under Rule 19 in that the defendant F. Wright Johnson has set forth in paragraph 5 of the Complaint and admitted therein is an employee of the State of New York and was acting within the scope of his employment at all times mentioned in the Complaint; and such action should not proceed without the State of New York added as a proper party.

FOR AN ELEVENTH, SEPARATE AND DISTINCT DEFENSE

15. Defendant Johnson at all times mentioned in the Complaint acted in his representative or official capacity as District Superintendent of Schools and not individually.

16. Defendant, F. Wright Johnson, demands and requests trial by jury on any and all issues therefor appropriate.

WHEREFORE, defendant F. Wright Johnson, prays that plaintiff's Complaint be dismissed on the merits.

Dated: January 15, 1974

JOHN C. SCHOLL, ESQ.
Attorney for Defendant F. Wright Johnson
Office & P.O. Address
408 Lomond Place
Utica, New York 13502

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACIE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	NOTICE OF MOTION TO DISMISS COMPLAINT Civil Action 73-CV-562

To Plaintiff, Francis C. Plano:

PLEASE TAKE NOTICE that the undersigned will bring the annexed motion to dismiss the Complaint in this action on for hearing before the Hon. James T. Foley, U.S. District Court, Federal Post Office Building, City of Albany, on the 21st day of January, 1974, at 10 o'clock in the forenoon of that date or as soon thereafter as counsel can be heard.

JOHN C. SCHOLL
Attorney for Defendant - F. Wright Johnson, Individually and as Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties
Office & P.O. Address
408 Lomond Place
Utica, New York 13502
Tel. (315) 732-6103

TO: BERNARD F. ASHE
Attorney for Plaintiff
Office & P.O. Address
80 Wolf Road
Albany, New York 12205

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	MOTION FOR DISMISSAL OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION Civil Action 73-CV-562

Upon the Complaint, the Answer, and the Annexed Affidavit, F. Wright Johnson, one of the defendants in this action, individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties, moves the court to dismiss the Complaint in this action as against defendant, F. Wright Johnson, individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties on the following grounds:

1. The Complaint fails to state a claim against defendant Johnson individually or as District Superintendent of Schools upon which relief can be granted.

2. That defendant Johnson acted reasonably, in good faith and within the scope of and pursuant to his duties and powers under Sections 2215, 3013 and 3031 of the Education Law of the State of New York.

3. Defendant Johnson did not act as an agent of the Board of Education of the Westmoreland Central School District at any time during the transactions and course of conduct complained of in the Complain herein.

4. Plaintiff has failed to follow statutory procedure set forth by the applicable laws of the State of New York to prosecute any cause of action which he may have deemed to exist against the School Board by his failure to comply with Section 3813 of the Education Law of the State of New York.

5. That the plaintiff has pursued an administrative remedy available to him under the Westmoreland Teachers Association agreement with the School District and has filed for reinstatement and other redress thereunder and that this action has not been concluded and is still pending.

6. The State of New York has not been joined in this action and is a party who must be joined in this action under Rule 19 in that the defendant F. Wright Johnson as set forth in paragraph 5 of the Complaint and admitted therein is an employee of the State of New York and was acting within the scope of his employment at all times mentioned in the Complaint; and such action should not proceed without the State of New York added as a proper party.

7. Defendant Johnson at all times mentioned in the Complaint acted in his representative or official capacity as District Superintendent of Schools and not individually.

8. Defendant Johnson alleges that the plaintiff has failed to exhaust his administrative and judicial remedies including but not limited to Section 310(4) of the Education Law of the State of New York and Article 78 of the Civil Practice Law and Rules of the State of New

York, which said remedies have heretofore been and at all times are still available to him.

9. That the Court has no jurisdiction for the reasons that the action is between citizens of the same state, the amount actually in controversy is less than Ten Thousand Dollars ($10,000.00), exclusive of interest and costs and presents for determination no question arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal District Court.

10. That any and all other rights which plaintiff has claimed, he has in fact voluntarily waived.

11. That the plaintiff at all times herein mentioned was a probationary teacher and subject to the provisions of the Education Law of the State of New York applicable thereto.

12. That all other grounds upon which counsel for all other defendants rely in their motions for similar relief are incorporated herein.

WHEREFORE, defendant F. Wright Johnson, prays that plaintiff's Complaint be dismissed on the merits.

Dated: January 16, 1974

JOHN C. SCH[illegible]L
Attorney for Defendant F. Wright Johnson
Office & P.O. Address
408 Lomond Place
Utica, New York 13502
Tel. (315) 732-6103

TO: BERNARD F. ASHE
Attorney for Plaintiff
Office & P.O. Address
80 Wolf Road
Albany, New York 12205

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	:	ANSWERING AFFIDAVIT Civil Action 73-CV-562

STATE OF NEW YORK)
) ss.:
COUNTY OF ONEIDA)

F. WRIGHT JOHNSON, being duly sworn, deposes and says:

1. I am the District Superintendent of Schools for the First Supervisory District of Oneida 1 - Madison-Herkimer Counties, State of New York and as such am an employee of the State of New York.

2. Pursuant to Sections 3031 and 3013 of the Education Law of the State of New York, I am given the authority to recommend to Boards of Education within my district, the discontinuance of the services of probationary teachers during their probationary period of employment. The power to accept or reject my recommendation rests solely with the Board of Education and I am not empowered in any manner to override their ultimate determinations.

3. There are approximately 303 probationary teachers in nine (9) schools in my supervisory district. In addition, there are approximately 522 tenured teachers in said schools. It is my responsibility to make recommendations to the nine (9) Boards of Education within my district with respect to all of these teachers. In view of the large number of teachers involved, procedures have been established whereby supervising principals of the schools within my district request me to make a recommendation to the Board of Education that certain probationary teachers' services be terminated. If I grant such requests, I then have no further control over the matter and the decision whether to retain or terminate the particular teacher rests solely with the Board of Education.

4. As required by the Education Law of the State of New York, I, together with defendant Baker, prepared and signed a letter to the plaintiff setting forth the reasons for my recommendation.

5. I have no authority or power to grant plaintiff a hearing to clarify, amplify or explain the reasons for his termination and do not have authority or power to compel any of the defendants to do so.

6. When acting as District Superintendent, I am acting as an employee of the State of New York and in no way am I or can I be considered to be an agent of the defendant Board of Education. Allegations contained in the Complaint to that effect are without legal basis and are merely plaintiff's convenient conclusions.

7. This action is frivolous on its face and demonstrates no probable success on the merits.

8. That deponent was not acting as an agent for the Westmoreland

Central School District at any time during the transactions complained of in the plaintiff's Complaint.

9. Deponent alleges that the plaintiff has failed to exhaust his administrative and judicial remedies including but not limited to Section 310(4) of the Education Law of the State of New York and Article 78 of the Civil Practice Law and Rules of the State of New York, which said remedies have heretofore been and at all times are still available to him.

10. Plaintiff has failed to follow statutory procedure set forth by the applicable laws of the State of New York to prosecute any cause of action which he may have deemed to exist against the School Board by his failure to comply with Section 3813 of the Education Law of the State of New York.

11. That the plaintiff at all times herein mentioned was a probationary teacher and subject to the provisions of the Education Law of the State of New York applicable hereto.

12. That the plaintiff has pursued an administrative remedy available to him under the Westmoreland Teachers Association agreement with the School District and has filed for reinstatement and other redress thereunder and that this action has not been concluded and is still pending.

13. That deponent is an employee of the State of New York and was acting within the scope of his employment at all times mentioned in the Complaint; upon information and belief that the State of New York has not been joined in this action, and the State of New York is a party who must be joined in this action under Rule 19; and that such action should not proceed without the State of New York added as a proper party.

WHEREFORE, defendant F. Wright Johnson, prays that plaintiff's Complaint be dismissed on the merits.

Subscribed and sworn before me
this 16 day of January, 1974.

/s/ F. Wright Johnson
F. Wright Johnson

/s/ John C. Scholl
Notary Public

John C. Scholl
Notary Public in the State of New York
Appointed in Oneida County
My Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PIEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

NOTICE OF CROSS-MOTION TO DISMISS AND ANSWERING AFFIDAVITS

Civil Action
No. 73-CV-562

TO: BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205

PLEASE TAKE NOTICE that the undersigned, will move this Court to dismiss Plaintiff's Complaint in addition to answering the motion brought by Plaintiff for a temporary restraining order and a preliminary injunction, before the Honorable James T. Foley, United States District Court, Federal Post Office Building, City of Albany, New York on the 21st day of January,

1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ Evans, Severn, Bankert, & Peet
EVANS, SEVERN, BANKERT, & PEET
Attorneys for Defendants Clifford W. Baker, Frank R. Melie, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo and Howard Walker
Office and Post Office Address:
301 Mayro Building
Utica, New York 13501
(315) 724-4151

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

CROSS-MOTION TO DISMISS COMPLAINT

Civil Action No. 73-CV-562

Upon the Complaint, Answer and annexed Affidavits, the Defendants move this Court for judgment dismissing the action on the merits because the complaint fails to state a cause of action against Defendants upon which relief can be granted and because facts which cannot be disputed show that no constitutional, Federal or other right of the Plaintiff has been violated by the action complained of, and that Plaintiff has

failed to exhaust his administrative and other remedies.

/s/ Evans, Severn, Bankert & Peet
EVANS, SEVERN, BANKERT & PEET
Attorneys for Defendants
Clifford W. Baker, Frank R. Melie, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo and Howard Walker
Office and Post Office Address:
301 Mayro Building
Utica, New York 13501
(315) 724-4151

TO: BERNARD F. ASHE, ESQ.
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	*	ANSWERING AFFIDAVIT Civil Action No. 73-CV-562

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

CLIFFORD W. BAKER, being duly sworn, does hereby depose and say:

1. That your deponent is the Supervising Principal of the Westmoreland Central School District.

2. That your deponent has read the Answer to the Complaint herein and does herewith affirm same incorporate same herein by reference, and does herewith reiterate and re-affirm same in response to admitting in whole or in part, and/or denying, in whole or in part, as the case may be, paragraphs numbered 1 - 27, of Plaintiff's affidavit herein for temporary and preliminary relief.

3. That the Plaintiff herein, at the times mentioned in the Complaint herein, was a secondary English Teacher at the Westmoreland Central School. That he taught students therein in the 10th and 11th Grades of High School ranging in age from 14 years of age and upwards. That these classes are mixed classes containing male pupils and female pupils.

4. That the Westmoreland Central School District lies in a substantially rural area. This is a small school district consisting of approximately 1700 pupil/in (sic) grades from kindergarten through high school seniors.

5. On July 1, 1972, Plaintiff was given a probationary appointment in the tenure area of Secondary English in the Westmoreland Central School District. A copy of his appointment is marked Exhibit "B" in Plaintiff's Complaint.

6. Plaintiff had never taught nor been appointed to teach at the Westmoreland Central School District prior to July 1, 1972.

7. On September 27, 1973, I determined to make a request to the District Superintendent of Schools for a recommendation to terminate the probationary appointment of Plaintiff as of November 1, 1973.

8. I made this request without direction or suggestion from the Board of Education of the School District.

9. The decision to terminate the probationary appointment of Plaintiff was made in accordance with the usual and customary procedures in such cases made and provided based upon ascertainable and definite standards and reasons therefore and Plaintiff was notified of such reasons.

10. At the Westmoreland Central School District, as at all Central School Districts, all teachers are initially appointed to a probationary period and employment does not become permanent during efficiency and good

behavior until after five years of continuous service in the school district as a teacher. Teachers who have not thus acquired permanent tenure are probationary for a period of five years.

11. The normal and customary meaning of a probationary appointment is that such a teacher is not entitled to a five year probationary period within which to prove himself, but rather, during said period, his appointment may be terminated at any time in accord with sections 3012, 3031 and 3019a of the Education Law of the State of New York.

12. That in the case of Plaintiff, in terminating his probationary period, the required steps and procedures as set forth in sections 3013, 3031, and 3019a of the Education Law were followed in all respects.

13. In addition to those provisions of law, the School District is also bound by the Taylor Law of the State of New York, which is that portion of the Civil Service Law and governs and mandates certain rights and obligations as between public employees and public employers. The Westmoreland Central School District is such a public or governmental employee as is defined in the Taylor Law. As such an employer, the Westmoreland Central School District is obliged to recognize employee associations or unions and to bargain with them and also is obliged to enter into negotiated agreements with Teachers Association.

14. On July 1, 1972, the Supervising Principal of the Westmoreland Central School District entered into an agreement with the Westmoreland Central School Teachers Association which said agreement was for a period of two years, until June 30, 1974. That during all of the times complained of by Plaintiff in his Complaint herein, said agreement was in full force and effect.

15. That the Plaintiff is a member of the Westmoreland Teachers Association.

16. That on the 6th day of November, 1973, the Plaintiff through the Westmoreland Teachers Association instituted grievance proceedings. On November 30, 1973, a formal written statement of grievances marked Exhibit "1" herein was presented to deponent. All of the steps required to be taken by the Plaintiff thereunder have been taken by him or in his behalf. The latest step taken in such proceedings was a hearing under paragraph "7" of the agreement. That your deponent conducted a hearing on the 10th day of December, 1973 and within five (5) days thereafter your deponent made a decision a copy of which is herein marked Exhibit "2" disallowing the grievance and forwarded same in writing to the President of the Teachers' Association and to the Association. No further response from Plaintiff or the Westmoreland Teachers Association has been received by your deponent or the school district.

Under paragraph 9 of the grievance procedure --- "The Teacher, represented by the Association may appeal a determination of the Superivisng Principal to the Board of Education and request a hearing of the Board of Education." This paragraph 9 makes it mandatory upon the Board of Education to grant a hearing. In past practice and procedure, in the following of this grievance procedure the Board of Education has granted a hearing, allowing the grieving teacher to present whatever evidence or witnesses he desired.

The grievance procedure goes even further, and in paragraph 12 thereof, states that if the grieving teacher or the Teachers Association is not satisfied with the decision of the Board of Education, they may then, within ten (10) days after the Board of Education's decision request that the grievance be submitted to arbitration by an arbitrator from the Public Employees Relations Board.

This is an administrative remedy available to Plaintiff. It is

still pending and has not been exhausted or concluded and provides him with an avenue to pursue the relief he requests without the necessity of instituting this Court action.

17. That the plaintiff has available to him an additional remedy or relief under section 310 subsection 4 of the Education Law of the State of New York. This section of law provides that any person conceiving himself aggrieved may review the determination of a Board of Education by appealing to the Commissioner of Education of the State of New York. The Plaintiff has not as yet, to my knowledge, availed himself of this remedy.

18. Further, it is in the opinion of deponent if the Plaintiff is re-instated by judicial order to his former teaching position in the Westmoreland School system, it will have a very detrimental effect upon and be very disruptive to the education process in that System.

19. Certain parents have stated to deponent that they will never let their children attend Plaintiff's classes. On December 7, 1973, which was the last day which Plaintiff taught in the Westmoreland School System, there was a sit-in strike of students carrying placards and wearing buttons in support of Plaintiff's retention. Police were called in, and it was necessary to close the School on that day. On this same date, there were incidents of physical contact between students in sympathy with and those not in sympathy with Plaintiff's retention. In deponent's opinion, these incidents would definitely re-occur.

20. Based on other statements made to deponent by parents and members of the School District, there is a definite threat that physical violence could occur if Plaintiff is summarily re-instated.

21. In point of fact, Plaintiff himself asked for police protection on December 7, 1973.

/s/ Clifford W. Baker
CLIFFORD W. BAKER

Sworn to before me this 15
day of January, 1974.

/s/ Michael J. DeSantis
Notary Public, County of Oneida, N.Y.

Comm. exp. 3/30/74

EXHIBIT "1" ATTACHED TO ANSWERING
AFFIDAVIT OF DEFENDANT BAKER

GRIEVANCE NO. 1-73/74

WESTMORELAND TEACHERS ASSOCIATION

WESTMORELAND, NEW YORK

STATEMENT OF GRIEVANCE DATE 11/30/73

STAGE 2

Aggrieved Party Donald R. Mattis, Et. al.

Position Grievance Chairman, Westmoreland Teachers Assoc.

Provision Violated Articles I, II, IXX, XXIII, XXVII, XXX, XXXI AND OTHERS

Nature of Grievance The Supervising Principal and Board of Education circumvented the intent and letter of the negotiated agreement in the dismissal of Mr. Frank Plano, a member of the negotiating unit.

Redress Sought Mr. Plano be immediately reinstated without loss of benefits and privelage and be granted $1,000 or appropriate amount in punitive damages.

Signed Donald R. Mattis
Teacher

Signed Donald R. Mattis
for the Association

EXHIBIT "2" ATTACHED TO ANSWERING
AFFIDAVIT OF DEFENDANT BAKER

WESTMORELAND CENTRAL SCHOOL DISTRICT
Westmoreland, New York 13490
315/853-6187 315/339-3000

Board of Education
Micky Romeo, President
Barbara Richards, Vice-President
John Acee
Cynthia Barns
John Nowak
James Plehn
Howard Walker

Supervising Principal
Clifford Baker

Building Principals
Richard Stanley,
Junior Senior High
Deforest A. Hill,
Elementary

Business Manager/Clerk
Frank R. Melie

December 17, 1973

Mr. Donald Mattis
Westmoreland Central School
Westmoreland, New York 13490

Re: Grievance #1-73/74

Dear Mr. Mattis:

I find that the statement of grievance #1-73/84, dated November 30, 1973, under the facts and under the law has no merit, and that no provisions of the agreement have been violated.

Therefore, there is no legal grievance, and the redress sought is herewith denied.

Sincerely yours,

/s/ Clifford Baker
CLIFFORD BAKER
Supervising Principal

CB/jh
cc: Westmoreland Teachers Association
Richard Rosinski

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PIANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

AFFIDAVIT

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

FRANK R. MELIE, being duly sworn, does hereby depose and say:

That your deponent is the Clerk of the Board of Education of the [sic] Westmoreland Central School District and is fully familiar with all of the facts set forth herein.

That as such Clerk, your deponent is an officer of such School District authorized under the Education Law and other pertinent statutes of the State of New York to accept or receive the service of process, or other notices concerning any actions, judicial and non judicial wherein any relief or redress is sought against said School District or its Board of Education.

That your deponent has examined the records kept in the ordinary course of business of the Westmoreland Central School and finds as follows:

That the Board of Education of the Westmoreland Central School District on November 2, 1973 did vote to terminate the probationary period of the Plaintiff and that notice of this termination was forwarded to the Plaintiff on November 5, 1973.

That your deponent further finds that no appeal from this decision and notice has been received by the Board of Education of the Westmoreland Central School District or filed therein, that no application for review of said decision and notice to the Commissioner of Education of the State of New York has been received by the Board of Education of the Westmoreland Central School District or filed therein.

That to the knowledge of deponent, the only papers received by your deponent and filed in the Clerk's Office since the Notice of Termination of Plaintiff's probationary period have been the Summons and Complaint in the within action and the Motion and Affidavit for temporary and preliminary relief in the within action. That, although not required to be filed in the Clerk's Office, there is also, in the school's records, the filing of the grievance under the Teacher's Agreement in behalf of Plaintiff.

That on or about October 3, 1973, a Notice, Exhibit "F" in the Complaint herein was forwarded to the Plaintiff, setting forth among, other things that the Plaintiff may file with the Clerk of the Board of Education a written response to the reasons for termination, not later than seven (7) days prior to the date of the Board Meeting on November 2, 1973.

That the Plaintiff did not, within said (7) day period file his Exhibit "J" with the Clerk of the Board. In fact, I never received a copy of same, at any time, from the Plaintiff.

/s/ Frank R. Melie
FRANK R. MELIE

Sworn to before me this 15th
day of January, 1974.

/s/ Arthur F. Barns
Notary Public, County of Oneida, N.Y.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York Defendants.		AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

RICHARD STANLEY, being duly sworn, deposes and says:

1. That he resides at RD #2, Rome, New York.

2. That since July 1, 1973, he has been the High School Principal in the Westmoreland Central School District, Westmoreland, New York.

3. That your deponent has an administrative policy which requires High School teachers to submit to him weekly lesson plans. The purpose of this policy is two-fold:

(a) In the event that a substitute teacher is called for, he will be able to show such plan to the substitute teacher;

(b) In the event that your deponent determines to moniter a class, he can read the lesson plan in advance of that class and have knowledge of what is to transpire.

4. That it is not your deponent's policy to read all lesson plans of all teachers for the purpose of approving content, and in point of fact, your deponent did not read the 10th-grade English assignment assigned by Francis C. Plano, a teacher in the Westmoreland School System prior to September 26, 1973, nor did he ever approve the same.

/s/ Richard Stanley
(RICHARD STANLEY)

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York Defendants.	ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

MICKEY ROMEO, being duly sworn, deposes and says:

1. That she resides at RD, Clinton, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance.

Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education ...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Parent-taxpayers have stated that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past;

a new probationary teacher would cause further disruption and be harmful to the students in those classes.

/s/ Mickey Romeo
MICKEY ROMEO

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JOHN A. NOWAK, being duly sworn, deposes and says:

1. That he resides at RD, Whitesboro, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of the Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance.

Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining his said vote.

4. That with regard to Exhibit "D" of the Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Upon information and belief parent-taxpayers have stated that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to

replace Plaintiff, and to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ John A. Nowak
JOHN A. NOWAK

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JAMES G. PLEHN, being duly sworn, deposes and says:

1. That he resides in Westmoreland, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, your deponent, at a meeting of the Westmoreland Central School Board, voted not to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District. Although the facts presented to the Board, including those in Exhibit "J" of Plaintiff's Complaint, and considered by the majority of the

Board were, in the opinion of your deponent, sufficient to warrant dismissal, your deponent felt, despite the failure of past efforts on the part of the Administration to correct deficiencies on the part of the Plaintiff, that the Plaintiff should be given one more opportunity to correct his deficiencies.

3. It is your deponent's opinion, now that the Plaintiff has left the Westmoreland School System, that a re-instatement to his former position in that System would be detrimental and disruptive to the educational processes in that School System.

4. There was a great deal of agitation in the School System preceding the Plaintiff's dismissal, and were the Plaintiff re-instated this agitation could well re-occur. A new probationary teacher has been retained to replace Plaintiff, and to now replace this new teacher would only cause further disruption, particularly to the classes directly involved.

5. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973.

6. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc. is incorrect.

/s/ James G. Plehn
JAMES G. PLEHN

Subscribed and sworn to before me
this 14th day of January, 1974

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

BARBARA RICHARDS, being duly sworn, deposes and says:

1. That she resides at RD #2, Rome, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not re-

ceived by the Clerk of the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. At least ten parent-taxpayers have stated to your deponent that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been

retained to replace Plaintiff, and to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ Barbara Richards
BARBARA RICHARDS

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York Defendants.	ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

CYNTHIA BARNS, being duly sworn, deposes and says:

1. That she resides at Westmoreland, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such

discontinuance. Exhibit "J" of Plaintiff's complaint although not received by the Clerk of the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Parent-taxpayers have stated to your deponent that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very

possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ Cynthia Barns
CYNTHIA BARNS

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JOHN ACEE, being duly sworn, deposes and says:

1. That he resides at RD #1, Whitesboro, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such

discontinuance. Exhibit "J" of the Plaintiff's Complaint, although not received by the Clerk of the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining his said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc. is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. At least three parent-taxpayers have stated to your deponent (and others, upon information and belief, feel likewise) that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the school. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very

possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ John Acee
JOHN ACEE

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	NOTICE OF CROSS-MOTION TO DISMISS and ANSWERING AFFIDAVITS Civil Action No. 73-CV-562

PLEASE TAKE NOTICE that the undersigned, upon the annexed affidavits, will move this Court to dismiss Plaintiff's Complaint in addition to answering the motion brought by Plaintiff for a temporary restraining order and a preliminary injunction, before the Honorable James T. Foley, United States District Court, Federal Post Office Building, City of Albany, New York, on the 21st day of January, 1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ Michael P. DeSantis
MICHAEL P. DeSANTIS, ESQ.
Attorney for Defendant Board of
Education of the Westmoreland
Central School District, et al
Office and Post Office Address:
709-10 First National Bank Building
Utica, New York 13501
Telephone: (315) 724-2155

TO: BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

CROSS-MOTION TO DISMISS COMPLAINT

Civil Action No. 73-CV-562

Upon the Complaint, Answer and annexed Affidavits, the Defendants move this Court for judgment dismissing the action on the merits because the complaint fails to state a cause of action against Defendants upon which relief can be granted and because facts which cannot be disputed show that no constitutional, Federal or other right of the Plaintiff has been violated by the action complained of, and that Plaintiff has failed to exhaust his administrative and other remedies.

/s/ Michael P. DeSantis, Esq.
MICHAEL P. DeSANTIS, ESQ.
Attorney for Defendant Board of Education of the Westmoreland Central School District, et al.
Office and Post Office Address:
709-10 First National Bank Building
Utica, New York 13501
Telephone: (315) 724-2155

TO: BERNARD F. ASHE, ESQ.
Attorney for Plaintiff
Office and P.O. Address:
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	ANSWERING AFFIDAVIT Civil Action No. 73-CV-562

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

CLIFFORD W. BAKER, being duly sworn, does hereby depose and say:

1. That your deponent is the Supervising Principal of the Westmoreland Central School District.

2. That your deponent has read the Answer to the Complaint herein and does herewith affirm same incorporate same herein by reference, and does herewith reiterate and re-affirm same in response to admitting in whole or in part, and/or denying, in whole or in part, as the case may be, paragraphs numbered 1 - 27, of Plaintiff's affidavit herein for temporary and preliminary relief.

3. That the Plaintiff herein, at the times mentioned in the Complaint

herein, was a secondary English Teacher at the Westmoreland Central School. That he taught students therein in the 10th and 11th Grades of High School ranging in age from 14 years of age and upwards. That these classes are mixed classes containing male pupils and female pupils.

4. That the Westmoreland Central School District lies in a substantially rural area. This is a small school district consisting of approximately 1700 pupil [sic] in grades from kindergarden through high school seniors.

5. On July 1, 1972, Plaintiff was given a probationary appointment in the tenure area of Secondary English in the Westmoreland Central School District. A copy of his appointment is marked Exhibit "B" in Plaintiff's Complaint.

6. Plaintiff had never taught nor been appointed to teach at the Westmoreland Central School District prior to July 1, 1972.

7. On September 27, 1973, I determined to make a request to the District Superintendent of Schools for a recommendation to terminate the probationary appointment of Plaintiff as of November 1, 1973.

8. I made this request without direction or suggestion from the Board of Education of the School District.

9. The decision to terminate the probationary appointment of Plaintiff was made in accordance with the usual and customary procedures in such cases made and provided based upon ascertainable and definite standards and reasons therefore and Plaintiff was notified of such reasons.

10. At the Westmoreland Central School District, as at all Central School Districts, all teachers are initially appointed to a probationary period and employment does not become permanent during efficiency and good behavior

until after five years of continuous service in the school district as a teacher. Teachers who have not thus acquired permanent tenure are probationary for a period of five years.

11. The normal and customary meaning of a probationary appointment is that such a teacher is not entitled to a five year probationary period within which to prove himself, but rather, during said period, his appointment may be terminated at any time in accord with sections 3013, 3031 and 3019a of the Education Law of the State of New York.

12. That in the case of Plaintiff, in terminating his probationary period, the required steps and procedures as set forth in sections 3013, 3031, and 3019a of the Education Law were followed in all respects.

13. In addition to those provisions of law, the School District is also bound by the Taylor Law of the State of New York, which is that portion of the Civil Service Law and governs and mandates certain rights and obligations as between public employees and public employers. The Westmoreland Central School District is such a public or governmental employee as is defined in the Taylor Law. As such an employer, the Westmoreland Central School District is obliged to recognize employee associations or unions and to bargain with them and also is obliged to enter into negotiated agreements with Teachers Association.

14. On July 1, 1972, the Supervising Principal of the Westmoreland Central School District entered into an agreement with the Westmoreland Central School Teachers Association which said agreement was for a period of two years until June 30, 1974. That during all of the times complained of by Plaintiff in his Complaint herein, said agreement was in full force and effect.

15. That the Plaintiff is a member of the Westmoreland Teachers Association.

16. That on the 6th day of November, 1973, the Plaintiff through the Westmoreland Teachers Association instituted grievance proceedings. On November 30, 1973, a formal written statement of grievances marked Exhibit "1" herein was presented to deponent. All of the steps required to be taken by the Plaintiff thereunder have been taken by him or in his behalf. The latest step taken in such proceedings was a hearing under paragraph "7" of the agreement. That your deponent conducted a hearing on the 10th day of December, 1973 and within five (5) days thereafter your deponent made a decision a copy of which is herein marked Exhibit "2" disallowing the grievance and forwarded same in writing to the President of the Teachers' Association and to the Association. No further response from Plaintiff or the Westmoreland Teachers Association has been received by your deponent or the School District.

Under paragraph 9 of the grievance procedure - - - "The Teachers represented by the Association may appeal a determination of the Supervising Principal to the Board of Education and request a hearing of the Board of Education." This paragraph 9 makes it mandatory upon the Board of Education to grant a hearing. In past practice and procedure, in the following of this grievance procedure the Board of Education has granted a hearing, allowing the grieving teacher to present whatever evidence or witnesses he desired.

The grievance procedure goes even further, and in paragraph 13 thereof, states that if the grieving teacher or the Teachers Association is not satisfied with the decision of the Board of Education, they may then, within ten (10) days after the Board of Education's decision request that

the grievance be submitted to arbitration by an arbitrator from the Public Employees Relations Board.

This is an administrative remedy available to Plaintiff. It is still pending and has not been exhausted or concluded and provides him with an avenue to pursue the relief he requests without the necessity of instituting this Court action.

17. That the Plaintiff has available to him an additional remedy or right to relief under section 310 subsection 4 of the Education Law of the State of New York. This section of law provides that any person conceiving himself aggrieved may review the determination of a Board of Education by appealing to the Commissioner of Education of the State of New York. The Plaintiff has not as yet, to my knowledge, availed himself of this remedy.

18. Further, it is in the opinion of deponent if the Plaintiff is reinstated by judicial order to his former teaching position in the Westmoreland School system, it will have a very detrimental effect upon and be very disruptive to the educational process in that System.

19. Certain parents have stated to deponent that they will never let their children attend Plaintiff's classes. On December 7, 1973, which was the last day which Plaintiff taught in the Westmoreland School System, there was a sit-in strike of students carrying placards and wearing buttons in support of Plaintiff's retention. Police were called in, and it was necessary to close the School on that day. On this same date, there were incidents of physical contact between students in sympathy with and those not in sympathy with Plaintiff's retention. In deponent's opinion, these incidents would definitely re-occur.

20. Based on other statements made to deponent by parents and members

of the School District, there is a definite threat that physical violence could occur if Plaintiff is summarily re-instated.

21. In point of fact, Plaintiff himself asked for police protection on December 7, 1973.

/s/ Clifford W. Baker
Clifford W. Baker

Sworn to before me this 15
day of January, 1974.

/s/ Michael P. DeSantis
Notary Public, County of Oneida, N.Y.

EXHIBIT "1" ATTACHED TO ANSWERING
AFFIDAVIT OF DEFENDANT BAKER

GRIEVANCE NO. 1-73/74

WESTMORELAND TEACHERS ASSOCIATION

WESTMORELAND, NEW YORK

STATEMENT OF GRIEVANCE DATE 11/30/73

STAGE 2

Aggrieved Party Donald R. Mattis, Et. al.

Position Grievance Chairman, Westmoreland Teachers Assoc.

Provision Violated Articles I, II, IXX, XXIII, XXVII, XXX, XXXI AND OTHERS

Nature of Grievance The Supervising Principal and Board of Education circumvented the intent and letter of the negotiated agreement in the dismissal of Mr. Frank Plano, a member of the negotiating unit.

Redress Sought Mr. Plano be immediately reinstated without loss of benefits and privelage and be granted $1,000 or appropriate amount in punitive damages.

Signed Donald R. Mattis
Teacher

Signed Donald R. Mattis
for the Association

EXHIBIT "2" ATTACHED TO ANSWERING
AFFIDAVIT OF DEFENDANT BAKER

WESTMORELAND CENTRAL SCHOOL DISTRICT

Westmoreland, New York 13490

315/853-6187 315/339-3000

Board of Education
Micky Romeo, President
Barbara Richards, Vice-President
John Acee
Cynthia Barns
John Nowak
James Plehn
Howard Walker

Supervising Principal
Clifford Baker

Building Principals
Richard Stanley,
Junior Senior High
Deforest A. Hill,
Elementary

Business Manager/Clerk
Frank R. Melie

December 17, 1973

Mr. Donald Mattis
Westmoreland Central School
Westmoreland, New York 13490

Re: Grievance #1-73/74

Dear Mr. Mattis:

I find that the statement of grievance #1-73/84, dated November 30, 1973, under the facts and under the law has no merit, and that no provisions of the agreement have been violated.

Therefore, there is no legal grievance, and the redress sought is herewith denied.

Sincerely yours,

/s/ Clifford Baker
CLIFFORD BAKER
Supervising Principal

CB/jh
cc: Westmoreland Teachers Association
Richard Rosinski

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneid [sic] 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New Yrok, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

FRANK R. MELIE, being duly sworn, does hereby depose and say:

That your deponent is the Clerk of the Board of Education of the [sic] Westmoreland Central School District and is fully familiar with all of the facts set forth herein.

That as such Clerk, your deponent is an officer of such School District authorized under the Education Law and other pertinent statutes of the State of New York to accept or receive the service of process, or other notices concerning any actions, judicial and non judicial wherein any relief or redress is sought against said School District or its Board of Education.

That your deponent has examined the records kept in the ordinary course of business of the Westmoreland Central School and finds as follows:

That the Board of Education of the Westmoreland Central School District on November 2, 1973 did vote to terminate the probationary period of the Plaintiff and that notice of this termination was forwarded to the Plaintiff on November 5, 1973.

That your deponent further finds that no appeal from this decision and notice has been received by the Board of Education of the Westmoreland Central School District or filed therein, that no application for review of said decision and notice to the Commissioner of Education of the State of New York has been received by the Board of Education of the Westmoreland Central School District or filed therein.

That to the knowledge of deponent, the only papers received by your deponent and filed in the Clerk's Office since the Notice of Termination of Plaintiff's probationary period have been the Summons and Complaint in the within action and the Motion and Affidavit for temporary and preliminary relief in the within action. That, although not required to be filed in the Clerk's Office, there is also, in the school's records, the filing of the grievance under the Teacher's Agreement in behalf of Plaintiff.

That on or about October 3, 1973, a Notice, Exhibit "F" in the Complaint herein was forwarded to the Plaintiff, setting forth among, other things that the Plaintiff may file with the Clerk of the Board of Education a written response to the reasons for termination, not later than seven (7) days prior to the date of the Board Meeting on November 2, 1973.

That the Plaintiff did not, within said seven (7) day period file his Exhibit "J" with the Clerk of the Board. In fact, I never received a copy

of same, at any time, from the Plaintiff.

/s/ Frank R. Melie
Frank R. Melie

Sworn to before me this 15th

day of January, 1974.

/s/ Arthur F. Barns
Notary Public, County of Oneida, N.Y.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

RICHARD STANLEY, being duly sworn, deposes and says:

1. That he resides at RD #2, Rome, New York.

2. That since July 1, 1973, he has been the High School Principal in the Westmoreland Central School District, Westmoreland, New York.

3. That your deponent has an administrative policy which requires High School teachers to submit to him weekly lesson plans. The purpose of this policy is two-fold:

(a) In the event that a substitute teacher is called for, he will be able to show such plan to the substitute teacher;

(b) In the event that your deponent determines to moniter a class, he can read the lesson plan in advance of that class and have knowledge of what is to transpire.

4. That it is not your deponent's policy to read all lesson plans of all teachers for the purpose of approving content, and in point of fact, your deponent did not read the 10th-grade English assignment by Francis C. Plano, a teacher in the Westmoreland School System prior to September 26, 1973, nor did he ever approve the same.

/s/ Richard Stanley
(Richard Stanley)

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PIANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

MICKEY ROMEO, being duly sworn, deposes and says:

1. That she resides at RD, Clinton, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of

the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Parent-taxpayers have stated that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and

to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ Mickey Romeo
(Mickey Romeo)

Subscribed and sworn to before me

this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JOHN A. NOWAK, being duly sworn, deposes and says:

1. That he resides at RD, Whitesboro, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of

the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining his said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Upon information and belief parent-taxpayers have stated that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to now replace this new teacher

would cause further disruption and be harmful to the students in those classes.

/s/ John A. Nowak
(John A. Nowak)

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

* *

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELJE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

* *

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JAMES G. PLEHN, being duly sworn, deposes and says:

1. That he resides in Westmoreland, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, your deponent, at a meeting of the Westmoreland Central School Board, voted not to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District. Although the facts presented to the Board, including those in Exhibit "J" of Plaintiff's Complaint, and considered by the majority of the

Board were, in the opinion of your deponent, sufficient to warrant dismissal, your deponent felt, despite the failure of past efforts on the part of the Administration to correct deficiencies on the part of the Plaintiff, that the Plaintiff should be given one more opportunity to correct his deficiencies.

3. It is your deponent's opinion, now that the Plaintiff has left the Westmoreland School System, that a re-instatement to his former position in that System would be detrimental and disruptive to the educational processes in that School System.

4. There was a great deal of agitation in the School System preceding the Plaintiff's dismissal, and were the Plaintiff re-instated this agitation could well re-occur. A new probationary teacher has been retained to replace the Plaintiff, and to now replace this new teacher would only cause further disruption, particularly to the classes directly involved.

5. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973.

6. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

/s/ James G. Plehn
(James G. Plehn)

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

BARBARA RICHARDS, being duly sworn, deposes and says:

1. That she resides at RD #2, Rome, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of the Board as prescribed by law, was received by your deponent on the evening

of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. At least ten parent-taxpayers have stated to your deponent that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to now replace this new teacher would

cause further disruption and be harmful to the students in those classes.

/s/ Barbara Richards
(Barbara Richards)

Subscribed and sworn to before me

this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

CYNTHIA BARNS, being duly sworn, deposes and says:

1. That she resides at Westmoreland, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of

the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Parent-taxpayers have stated to your deponent that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to now replace this new teacher could cause further

disruption and be harmful to the students in those classes.

/s/ Cynthia Barns
(Cynthia Barns)

Subscribed and sworn to before me

this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JOHN ACEE, being duly sworn, deposes and says:

1. That he resides at RD #1, Whitesboro, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance.

Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining his said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is reinstated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. At least three parent-taxpayers have stated to your deponent (and others, upon information and belief, feel likewise) that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater

extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to ... replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ John Acee
(John Acee)

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLAND, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA PICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York Defendants.	:	ANSWERING AFFIDAVIT ON MOTION 73-CV-562 FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) ss.:
COUNTY OF ONEIDA)

F. WRIGHT JOHNSON being duly sworn, deposes and says:

1. I am the District Superintendent of Schools for the First Supervisory District of Oneida 1 - Madison-Herkimer Counties, State of New York and as such am an employee of the State of New York.

2. Pursuant to Sections 3031 and 3013 of the Education Law of the State of New York, I am given the authority to recommend to Boards of Education within my district, the discontinuance of the services of probationary teachers during their probationary period of employment. The power to accept or reject my recommendation rests solely with the Board of Education I am not empowered in any manner to override their ultimate

determinations.

3. Since I have no authority or power to reinstate or reappoint teachers to their positions, nor power to even affirmatively recommend the reinstatement of probationary teachers, I am not a proper party to plaintiff's motion for a temporary restraining order seeking the mandatory or affirmative relief of reinstatement to his teaching position.

4. That the power vested in me to make recommendations for the termination of probationary teachers is only and in no way interferes with the freedoms guaranteed persons under the first and fourteenth amendments. The act of recommending Plaintiff's termination in no way violated plaintiff's rights to due process and freedom of speech, nor did it deprive him of a property or personal right under the United States Constitution.

5. There are approximately 303 probationary teachers in nine (9) schools in my supervisory district. In addition, there are approximately 522 tenured teachers in said schools. It is my responsibility to make recommendations to the nine (9) Boards of Education within my district with respect to all of these teachers. In view of the large number of teachers involved, procedures have been established whereby supervising principals of the schools within my district request me to make a recommendation to the Board of Education that certain probationary teachers' services be terminated. If I grant such requests, I then have no further control over the matter and the decision whether to retain or terminate the particular teacher rests solely with the Board of Education.

6. As required by the Education Law of the State of New York, I, together with defendant Baker, prepared and signed a letter to the plaintiff setting forth the reasons for my recommendations.

7. I have no authority or power to grant plaintiff a hearing to clarify, amplify or explain the reasons for his termination and do not have authority or power to compel any of the defendants to do so.

8. When acting as District Superintendent, I am acting as an employee of the State of New York and in no way am I or can I be considered to be an agent of the defendant Board of Education. Allegations contained in the Complaint to that effect are without legal basis and are merely plaintiff's convenient conclusions.

9. Plaintiff has not been irreparably harmed by the events which have taken place and if his reinstatement were ordered it would create confusion and havoc and greatly interfere with the educational process at Westmoreland Central School. Affidavits of Clifford W. Baker, Frank R. Melie, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo and Richard Stanley which support my contentions are attached hereto.

10. With respect to Exhibit D attached to plaintiff's Complaint, the form used by defendant Baker has been obsolete for approximately three years. It was superseded by a new request form, a copy of which is attached hereto and made a part hereof. The new form was prepared by my office and distributed to all of the schools within my supervisory district, including Westmoreland Central School, approximately three years ago. Through inadvertence, defendant Baker used the obsolete forms which I accepted and dealt with purely as a request by a supervisory principal and not as a request by a Board of Education.

11. This action is frivolous on its face and demonstrates no probable success on the merits.

12. Plaintiff has an adequate remedy at law and should he succeed in

this action can be adequately monetarily compensated for his damages.

13. That deponent has read the Answer herein and states that the factual allegations contained therein are true and incorporated herein by reference.

14. That deponent incorporates herein the arguments of counsel for all other defendants as they may be applicable.

WHEREFORE, deponent respectfully requests that plaintiff's motion for a temporary restraining order and preliminary injunction be denied and that this Court grant such other further and different relief as may be deemed just and proper.

/s/ F. Wright Johnson
F. WRIGHT JOHNSON

Subscribed and sworn to before me
this 16th day of January, 1974.

/s/ John C. Scholl
Notary Public

DEPARTMENT OF EDUCATION
FIRST SUPERVISORY DISTRICT OF ONEIDA, MADISON AND HERKIMER COUNTIES
BOX 233, YORKVILLE, NEW YORK 13495

REQUEST
TO THE DISTRICT SUPERINTENDENT OF SCHOOLS
THAT PROBATIONARY PERIOD BE TERMINATED

It is the opinion of the Chief School Administrator that the probationary period of

_____
(Name of teacher)

should be terminated as of _____
(date)

Date _____ Signature _____
(Chief School Administrator)

School District _____

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	*	ANSWERING AFFIDAVIT Civil Action No. 73-CV-562

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

CLIFFORD W. BAKER, being duly sworn, does hereby depose and say:

1. That your deponent is the Supervising Principal of the Westmoreland Central School District.

2. That your deponent has read the Answer to the Complaint herein and does herewith affirm same incorporate same herein by reference, and does herewith reiterate and re-affirm in response to admitting in whole or in part, and/or denying, in whole or in part, as the case may be, paragraphs numbered 1 - 27, of Plaintiff's affidavit herein for temporary and preliminary relief.

3. That the Plaintiff herein, at the times mentioned in the Complaint herein, was a secondary English Teacher at the Westmoreland Central School.

That he taught students therein in the 10th and 11th grades of High School ranging in age from 14 years of age and upwards. That these classes are mixed classes containing male pupils and female pupils.

4. That the Westmoreland Central School District lies in a substantially rural area. This is a small school district consisting of approximately 1700 pupil [sic] in grades from kindergarden through high school seniors.

5. On July 1, 1972, Plaintiff was given a probationary appointment in the tenure area of Secondary English in the Westmoreland Central School District. A copy of his appointment is marked Exhibit "B" in Plaintiff's Complaint.

6. Plaintiff had never taught nor been appointed to teach at the Westmoreland Central School District prior to July 1, 1972.

7. On September 27, 1973, I determined to make a request to the District Superintendant of Schools for a recommendation to terminate the probationary appointment of Plaintiff as of November 1, 1973.

8. I made this request without direction or suggestion from the Board of Education of the School District.

9. The decision to terminate the probationary appointment of Plaintiff was made in accordance with the usual and customary procedures in such cases made and provided based upon ascertainable and definite standards and reasons therefore and Plaintiff was notified of such reasons.

10. At the Westmoreland Central School District, as at all Central School Districts, all teachers are initially appointed to a probationary period and employment does not become permanent during efficiency and good behavior until after five years of continuous service in the school distirct as a teacher. Teachers who have not thus acquired permanent tenure are

probationary for a period of five years.

11. The normal and customary meaning of a probationary appointment is that such a teacher is not entitled to a five year probationary period within which to prove himself, but rather, during said period, his appointment may be terminated at any time in accord with section 3013, 3031 and 3019a of the Education Law of the State of New York.

12. That in the case of Plaintiff, in terminating his probationary period, the required steps and procedures as set forth in sections 3013, 3031, and 3019a of the Education Law were followed in all respects.

13. In addition to those provisions of law, the School District is also bound by the Taylor Law of the State of New York, which is that portion of the Civil Service Law and governs and mandates certain rights and obligations as between public employees and public employers. The Westmoreland Central School District is such a public or governmental employee as is defined in the Taylor Law. As such an employer, the Westmoreland Central School District is obliged to recognize employee associations or unions and to bargain with them and also is obliged to enter into negotiated agreements with Teachers Association.

14. On July 1, 1972, the Supervising Principal of the Westmoreland Central School District entered into an agreement with the Westmoreland Central School Teachers Association which said agreement was for a period of two years, until June 30, 1974. That during all of the times complained of by Plaintiff in his complaint herein, said agreement was in full force and effect.

15. That the Plaintiff is a member of the Westmoreland Teachers Association.

16. That on the 6th day of November, 1973, the Plaintiff through the Westmoreland Teachers Association instituted grievance proceedings. On November 30, 1973, a formal written statement of grievances marked Exhibit "1" herein was presented to deponent. All of the steps required to be taken by the Plaintiff thereunder have been taken by him or in his behalf. The latest step taken in such proceedings was a hearing under paragraph "7" of the agreement. That your deponent conducted a hearing on the 10th day of December, 1973 and within five (5) days thereafter your deponent made a decision a copy of which is herein marked Exhibit "2" disallowing the grievance and forwarded same in writing to the President of the Teachers' Association and to the Association. No further response from Plaintiff or the Westmoreland Teachers Association has been received by your deponent or the School District.

Under paragraph 9 of the grievance procedure - - - "The Teacher, represented by the Association may appeal a determination of the Supervising Principal to the Board of Education and request a hearing of the Board of Education." This paragraph 9 makes it mandatory upon the Board of Education to grant a hearing. In past practice and procedure, in the following of this grievance procedure the Board of Education has granted a hearing, allowing the grieving teacher to present whatever evidence or witnesses he desired.

The grievance procedure goes even futher, and in paragraph 12 thereof, states that if the grieving teacher or the Teachers Association is not satisfied with the decision of the Board of Education, they may then, within ten (10) days after the Board of Education's decision request that the grievance be submitted to arbitration by an arbitrator from the Public Employees Relations Board.

This is an administrative remedy available to Plaintiff. It is still

pending and has not been exhausted or concluded and provides him with an avenue to pursue the relief he requests without the necessity of instituting this Court action.

17. That the Plaintiff has available to him an additional remedy or right to relief under section 310 subsection 4 of the Education Law of the State of New York. This section of law provides that any person conceiving himself aggrieved may review the determination of a Board of Education by appealing to the Commissioner of Education of the State of New York. The Plaintiff has not as yet, to my knowledge, availed himself of this remedy.

18. Further, it is in the opinion of deponent if the Plaintiff is re-instated by judicial order to his former teaching position in the Westmoreland School System, it will have a very detrimental effect upon and be very disruptive to the educational process in that System.

19. Certain parents have stated to deponent that they will never let their children attend Plaintiff's classes. On December 7, 1973, which was the last day which Plaintiff taught in the Westmoreland School System, there was a sit-in strike of students carrying placards and wearing buttons in support of Plaintiff's retention. Police were called in, and it was necessary to close the School on that day. On this same date, there were incidents of physical contact between students in sympathy with and those not in sympathy with Plaintiff's retention. In deponent's opinion, these incidents would definitely re-occur.

20. Based on other statements made to deponent by parents and members of the School District, there is a definite threat that physical violence could occur if Plaintiff is summarily re-instated.

21. In point of fact, Plaintiff himself asked for police protection on December 7, 1973.

/s/ Clifford W. Baker
CLIFFORD W. BAKER

Sworn to before me this 15
day of January, 1974.

/s/ Michael P. DeSantis
Notary Public, County of Oneida, N.Y.

EXHIBIT "1" ATTACHED TO ANSWERING
AFFIDAVIT OF DEFENDANT BAKER

GRIEVANCE NO. 1-73/74

WESTMORELAND TEACHERS ASSOCIATION

WESTMORELAND, NEW YORK

STATEMENT OF GRIEVANCE DATE 11/30/73

STAGE 2

Aggrieved Party Donald R. Mattis, Et. al.

Position Grievance Chairman, Westmoreland Teachers Assoc.

Provision Violated Articles I, II, IXX, XXIII, XXVII, XXX, XXXI AND OTHERS

Nature of Grievance The Supervising Principal and Board of Education circumvented the intent and letter of the negotiated agreement in the dismissal of Mr. Frank Plano, a member of the negotiating unit.

Redress Sought Mr. Plano be immediately reinstated without loss of benefits and privelage and be granted $1,000 or appropriate amount in punitive damages.

Signed Donald R. Mattis
Teacher

Signed Donald R. Mattis
for the Association

EXHIBIT "2" ATTACHED TO ANSWERING
AFFIDAVIT OF DEFENDANT BAKER

WESTMORELAND CENTRAL SCHOOL DISTRICT
Westmoreland, New York 13490
315/853-6187 315/339-3000

Board of Education
Micky Romeo, President
Barbara Richards, Vice-President
John Acee
Cynthia Barns
John Nowak
James Plehn
Howard Walker

Supervising Principal
Clifford Baker

Building Principals
Richard Stanley,
Junior Senior High
Deforest A. Hill,
Elementary

Business Manager/Clerk
Frank R. Melie

December 17, 1973

Mr. Donald Mattis
Westmoreland Central School
Westmoreland, New York 13490

Re: Grievance #1-73/74

Dear Mr. Mattis:

I find that the statement of grievance #1-73/84, dated November 30, 1973, under the facts and under the law has no merit, and that no provisions of the agreement have been violated.

Therefore, there is no legal grievance, and the redress sought is herewith denied.

Sincerely yours,

/s/ Clifford Baker
CLIFFORD BAKER
Supervising Principal

CB/jh
cc: Westmoreland Teachers Association
Richard Rosinski

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

FRANK R. MELIE, being duly sworn, does hereby depose and say:

That your deponent is the Clerk of the Board of Education of the [sic] Westmoreland Central School District and is fully familiar with all of the facts set forth herein.

That as such Clerk, your deponent is an officer of such School District authorized under the Education Law and other pertinent statutes of the State of New York to accept or receive the service of process, or other notices concerning any action, judicial and non judicial wherein any relief or redress is sought against said School District or its Board of Education.

That your deponent has examined the records kept in the ordinary

course of business of the Westmoreland Central School and finds as follows:

That the Board of Education of the Westmoreland Central School District on November 2, 1973 did vote to terminate the probationary period of the Plaintiff and that notice of this termination was forwarded to the Plaintiff on November 5, 1973.

That your deponent further finds that no appeal from this decision and notice has been received by the Board of Education of the Westmoreland Central School District or filed therein, that no application for review of said decision and notice to the Commissioner of Education of the State of New York has been received by the Board of Education of the Westmoreland Central School District or filed therein.

That to the knowledge of deponent, the only papers received by your deponent and filed in the Clerk's Office since the Notice of Termination of Plaintiff's probationary period have been the Summons and Complaint in the within action and the Motion and Affidavit for temporary and preliminary relief in the within action. That, although not required to be filed in the Clerk's Office, there is also, in the school's records, the filing of the grievance under the Teacher's Agreement in behalf of Plaintiff.

That on or about October 3, 1973, a Notice, Exhibit "F" in the Complaint herein was forwarded to the Plaintiff, setting forth among, other things that the Plaintiff may file with the Clerk of the Board of Education a written response to the reasons for termination, not later than seven (7) days prior to the date of the Board Meeting on November 2, 1973.

That the Plaintiff did not, within said seven (7) day period file

his Exhibit "J" with the Clerk of the Board. In fact, I never received a copy of same, at any time, from the Plaintiff.

/s/ Frank R. Melie
FRANK R. MELIE

Sworn to before me this 15th
day of January, 1974.

/s/ Arthur F. Barns
Notary Public, County of Oneida, N.Y.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JOHN ACEE, being duly sworn, deposes and says:

1. That he resides at RD #1, Whitesboro, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of the Board as prescribed by law, was received by your deponent on the evening of November

1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining his said vote.

4. That with regard to Exhibit "D" of Plaintiff's complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. At least three parent-taxpayers have stated to your deponent (and others, upon information and belief, feel likewise) that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to now replace this new teacher would cause further

disruption and be harmful to the students in those classes.

/s/ John Acee
JOHN ACEE

Subscribed and sworn to before me

this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLAND, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York Defendants.	ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

CYNTHIA BARNS, being duly sworn, deposes and says:

1. That she resides at Westmoreland, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk

of the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Parent-taxpayers have stated to your deponent that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to

replace Plaintiff, and to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ Cynthia Barns
CYNTHIA BARNS

Subscribed and sworn to before me

this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JOHN A. NOWAK, being duly sworn, deposes and says:

1. That he resides at RD, Whitesboro, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and the deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of

the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reason given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining his said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Upon information and belief parent-taxpayers have stated that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent that in the past; a new probationary teacher has been retained to

replace Plaintiff, and to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ John A. Nowak
JOHN A. NOWAK

Subscribed and sworn to before me

this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLAND, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York Defendants.	ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

JAMES G. PLEHN, being duly sworn, deposes and says:

1. That he resides in Westmoreland, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, your deponent, at a meeting of the Westmoreland Central School Board, voted not to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District. Although the facts presented to the Board, including those in Exhibit "J" of Plaintiff's Complaint, and considered by the majority of the Board were, in the opinion of your deponent, sufficient to warrant dismissal,

your deponent felt, despite the failure of past efforts on the part of the Administration to correct deficiencies on the part of the plaintiff, that the Plaintiff should be given one more opportunity to correct his deficiencies.

3. It is your deponent's opinion, now that the Plaintiff has left the Westmoreland School System, that a re-instatement to his former position in that System would be detrimental and disruptive to the educational processes in that School System.

4. There was a great deal of agitation in the School System preceding the Plaintiff's dismissal, and were the Plaintiff re-instated this agitation could well re-occur. A new probationary teacher has been retained to replace the Plaintiff, and to now replace this new teacher would only cause further disruption, particularly to the classes directly involved.

5. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973.

6. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

/s/ James G. Plehn
JAMES G. PLEHN

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLAND, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

BARBARA RICHARDS, being duly sworn, deposes and says:

1. That she resides at RD #2, Rome, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of the Board as prescribed by law, was received by your deponent on the

evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. At least ten parent-taxpayers have stated to your deponent that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the School. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to

replace Plaintiff, and to now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ Barbara Richards
BARBARA RICHARDS

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PIANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

MICKEY ROMEO, being duly sworn, deposes and says:

1. That she resides at RD, Clinton, New York, is a member of the Board of Education of the Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That on November 2, 1973, deponent voted with the majority of said Board to discontinue the services of Plaintiff as a probationary teacher in the Westmoreland Central School District; and that deponent's vote was based on a conviction that the reasons set forth in Exhibit "H" of Plaintiff's Complaint were proven and were sufficient to warrant such discontinuance. Exhibit "J" of Plaintiff's Complaint, although not received by the Clerk of

the Board as prescribed by law, was received by your deponent on the evening of November 1, 1973, and all of the facts contained in Exhibit "J" as they pertained to the reasons given in Exhibit "H" were carefully reviewed and considered.

3. That your deponent denies that "a rumor that deponent had dated a ninth-grade girl" (see Plaintiff's affidavit of January 8, 1974) was discussed at a Board meeting on October 30, 1973, and denies that this or any other rumor was a factor in determining her said vote.

4. That with regard to Exhibit "D" of Plaintiff's Complaint, your deponent denies that the Westmoreland Board of Education formed an opinion, prior to November 2, 1973, to terminate Plaintiff's probationary period, and the statement in Exhibit "D" that "it is the opinion of the Board of Education...", etc., is incorrect.

5. It is the opinion of your deponent that if the Plaintiff is re-instated to his former teaching position in the Westmoreland School System, it will have a definite detrimental effect upon and be very disruptive to the educational process in that System. Parent-taxpayers have stated that they will never allow a child of theirs to be taught English, a required course, by Plaintiff. A great deal of agitation, and, upon information and belief, physical contact, between sympathizers with Plaintiff and those not in sympathy with him, occurred in the School System preceding the Plaintiff's dismissal, including a sit-in strike which necessitated the closing of the school. In the opinion of your deponent, if the Plaintiff were re-instated, this agitation would re-occur very possibly to a greater extent than in the past; a new probationary teacher has been retained to replace Plaintiff, and to

now replace this new teacher would cause further disruption and be harmful to the students in those classes.

/s/ Mickey Romeo
MICKEY ROMEO

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	ANSWERING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Oneida)

RICHARD STANLEY, being duly sworn, deposes and says:

1. That he resides at RD #1, Rome, New York.

2. That since July 1, 1973, he has been the High School Principal in the Westmoreland Central School District, Westmoreland, New York.

3. That your deponent has an administrative policy which requires High School teachers to submit to him weekly lesson plans. The purpose of this policy is two fold:

(a) In the event that a substitute teacher is called for, he will be able to show such plan to the substitute teacher;

(b) In the event that your deponent determines to moniter a class, he can read the lesson plan in advance of that class and have knowledge of what is to transpire.

4. That it is not your deponent's policy to read all lesson plans of all teachers for the purpose of approving content, and in point of fact, your deponent did not read the 10th-grade English assignment assigned by Francis C. Plano, a teacher in the Westmoreland School System prior to September 26, 1973, nor did he ever approve the same.

/s/ Richard Stanley
RICHARD STANLEY

Subscribed and sworn to before me
this 14th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS

Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	SUPPLEMENTAL AFFIDAVIT Civil Action No. 73-CV-562

STATE OF NEW YORK) SS.:
COUNTY OF ALBANY)

FRANCIS C. PLANO, being duly sworn, deposes and says:

1. That deponent is the plaintiff herein and makes this affidavit in support of his Complaint and Motion for a Temporary Restraining Order and Preliminary Injunction.

2. That as of this date, deponent has applied by letter and application for a position in secondary education to the following schools:

a. City of Utica Public Schools, Utica, N.Y.

b. Rome Public Schools, Rome, N.Y.

c. Whitesboro Public Schools, Whitesboro, N.Y.

d. Sauquoit Valley Public Schools, Sauquoit, N.Y.

e. Oriskaney Central School, Oriskaney, N.Y.

f. New York Mills Public Schools, New York Mills, N.Y.

g. New Hartford Public Schools, New Hartford, N.Y.

h. Town of Webb, Old Forge, New York, Public Schools

3. That in December of 1973, deponent was interviewed by a Mr. Michael Salerno, Assistant Superintendent of the Utica Public Schools.

4. That during the above mentioned interview almost the entire time was spent by Mr. Salerno in asking deponent about deponent's termination and what had occurred in the Westmoreland Central Schools.

5. That Mr. Salerno was concerned over how deponent's law suit would affect his job performance if he were hired to teacher (sic) in the Utica Public Schools.

6. That Mr. Salerno arranged an interview for deponent with a Mr. Joseph Lubertine, Principal of J. F. Kennedy High School in Utica, and at that interview in January of 1974, over half the interview concerned questions by Mr. Lubertine regarding the events which led to deponent's termination at the Westmoreland Central Schools.

7. That deponent has arranged for an interview with a Mr. Edward A. Pascucci, Assistant Superintendent of the Rome Public Schools, for the week of January 28, 1974.

8. That as of this date deponent remains unemployed.

9. That deponent's summary and prejudicial dismissal from the Westmoreland Central Schools has and will continue to be a negative factor in seeking further gainful employment.

10. That deponent believes that his summary mid-semester dismissal and the existence of his law suit will materially affect his ability to

obtain employment at this time. See letters from schools, Appendix "1".

11. That upon information and belief, deponent states that his case has been given widespread publicity in the City of Westmoreland and surrounding communities, greatly jeopardizing his chances for new employment. News clippings from local papers are attached as Appendix "2".

12. That deponent herein reiterates and incorporates all prior allegations contained in the Complaint and Motion by reference.

/s/ Francis C. Plano
FRANCIS C. PLANO

SUBSCRIBED AND SWORN to before me
this 28th day of January, 1974.

/s/ Ivor R. Moskowitz
Notary Public

Ivor R. Moskowitz
Notary Public, State of New York
Residing in Albany County
8037880
My Commission expires March 30, 1974

APPENDIX "1", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

WHITESBORO CENTRAL SCHOOL
WHITESBORO, NEW YORK 13492

Supervising Principal
Lawrence M. Rosebush
315 792-4545

BOARD OF EDUCATION

WILLIAM D. KAY, President
B. ALTON BLACKWELDER
WILLIAM A. BRINK
FRANK H. GRUENEWALD
JAMES S. LINDSEY
EDWARD F. SLOMA
NANCY T. WALDRON
ALFRED T. PETERS, Treasurer

Central Office Staff

ASSISTANT SUPERVISING PRINCIPAL
ADMINISTRATION AND PERSONNEL

WILLIAM W. MAHANEY
315 792-4402

December 10, 1973

Mr. Frank C. Plano
11 Michigan Avenue
Ilion, New York 13357

Dear Mr. Plano:

I am replying to your letter of December 1st concerning an English position in our Junior or Senior High School.

At the present time, we do not anticipate a vacancy in our English Department for the remainder of the school year.

I appreciate your making inquiry and your letter will be kept on file.

Sincerely,

/s/ William W. Mahaney
William W. Mahaney
Assistant Supervising Principal

WWM:lo

Jerome E. Burdick, President
Russell Whyte, Clerk

RICHARD L. ALITO, High School Principal
NORMA HARTER, Elementary Principal
LORRAINE FLORCZYK, Junior High Guidance
RICHARD THOMAS, Senior High Guidance

Oriskany Central School

CENTRAL SCHOOL DISTRICT NO. 1
Towns of Whitestown - Marcy - Floyd - Rome

KENNETH J. GADBOW, SUPERVISING PRINCIPAL

ORISKANY, N.Y. 13424

December 4, 1974

Mr. Frank C. Plano

11 Michigan Ave.

Ilion, New York 13357

Dear Mr. Plano

We do not have a vacancy in our school at this time.

It is Board of Education Policy to advertise all vacancies in the Rome Sentinel and the Utica Observer Dispatch. We also advertise through placement bureaus and professional employment offices that serve our area.

Sincerely yours,

/s/ Richard L. Alito
Richard L. Alito
High School Principal

NEW YORK MILLS JUNIOR-SENIOR HIGH SCHOOL
New York Mills, N.Y. 13417
315 736-3091

ACCREDITED BY MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS

December 4, 1973

Mr. Frank C. Plano
11 Michigan Avenue
Ilion, New York 13357

Dear Mr. Plano:

This letter will serve to inform you that we do not anticipate any teaching vacancies during the current school year in the New York Mills Junior-Senior High School English department.

However, you may wish to apply for future vacancies should they materialize and we have, therefore, included an application form.

Sincerely,

/s/ Robert L. Cleveland
Dr. Robert L. Cleveland
Supv. Principal

RLC:wp
Enc.

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Reserves Decision in Plano's Suit

ALBANY—U.S. District Court Judge James Foley yesterday reserved decision after hearing arguments in a suit filed by Francis G. Plano, a former Westmoreland Central School English teacher who was fired last month, allegedly for assingning his pupils to write essays on premarital sex.

Judge Foley called Plano's request for a temporary restraining order "quite drastic" and questioned whether the case actually belonged on Federal Court. He gave the attorneys 10 days to file reply briefs

Plano, 24, is seeking a temporary restraining order for immediate reinstatement to his job, a preliminary injunction along with back pay and damages. He alleges that his dismissal by the Westmoreland board of Education by a 5-2 vote without a hearing violated his rights of free speech and due process as guaranteed by the First and 14th Anendments to the Constitution.

Plano's attorney, Bernard P. Ashe of Albany, further argued that Plano's dismissal in the middle of a school year attaches "a stigma" to Plano and has hampered his ability to find other employment as a teacher.

Defense attorneys, representing the supervising principal, the district supedrintendent, the district clerk and school board members, argued that Plano's dismissal was in full compliance with state law and that all legal procedures were followed.

The case stems from Plano's assigning an essay last September on pre-marital sex attitudes to his 11th and 12th grade pupils. Plano contends he submitted his lesson plan in advance to his building principal.

Utica Daily Press Jan 22, 1974

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Rome Daily Sentinel
ROME, N.Y.,
JANUARY 10, 1974
PART TWO PAGE 15

District selects counsel in lawsuit

WESTMORELAND — The law firm of Evans, Severn, Bankert & Peet, Utica, has been selected to represent 22 defendants in the Westmoreland Central School District named in a lawsuit by former high school teacher Frank Plano.

The federal court lawsuit was filed Dec. 27 on Plano's behalf with Chief Deputy Clerk James K. Evans by State Teachers Association attorney Bernard Ashe, Albany.

Besides the seven members of the Board of Education, the defendants include Clifford Baker, supervising principal; F. Wright Johnson, district school superintendent, and Frank Melie, district clerk.

Plano, a non-tenured 10th grade English teacher, is seeking reinstatement, back pay and lawyers' fees. Each defendant has until Jan. 16 to respond to the charges.

Plano was fired by the board Nov. 2, effective Dec. 7 because of non-cooperation with the administration. Plano contends he was dismissed because he assigned classes to write a paragraph on their opinion of pre-marital sex.

In other action, the board gave unanimous approval to the implementation of a program that will enable qualified high school students to earn college credits before high school graduation. Students will be canvassed for the program. It is anticipated that five per cent of the student body will be able to handle the new concept.

The board also approved the immediate implementation of any change in the school's starting time recommended by the Board of Cooperative Educational Services (BOCES) Task Force Committee Tuesday, Jan. 15. Members discussed the possibility of a half-hour later starting time because of the change to daylight saving time.

Members voted the use of computer services for business management, and a supplement to a 10th grade math course for the remainder of the school year. Use of the computer will be through Griffiss AFB, at no cost to the school.

Rental of the teletype printer for the math course will cost between $85 to $100 per month.

In other action, the board:

AUTHORIZED the issuance of Bond Anticipation Notes in payment for three school buses at a cost of $25,776.39.

APPOINTED Lynette VanBenschoten as a full-time cleaner, and Elizabeth Satterlee and Jeanie Foppes as substitutes in the food service area.

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Rome Sentinel 12-29-73

Westmoreland board taken to U. S. court

A federal court lawsuit has been filed against 22 defendants — including all seven members of the Westmoreland Central School Board of Education — on behalf of Francis C. Plano, 24, of 11 Michigan Ave., Ilion, who says he was fired because he assigned a composition on pre - marital sex.

Seeking reinstatement, back pay and lawyers' fees, the legal papers were filed with Chief Deputy Clerk James K. Evans by New York State Teachers Association attorney Bernard Ashe, Albany.

Among those named in the suit are Clifford W. Baker, supervising principal; F. Wright Johnson, district superintendent and Frank Melie, district clerk.

U.S. Marshals served the papers Thursday. Each defendant has 20 days in which to respond to the charges.

Legal action stems from an assignment which Plano, a probationary teacher, gave his 10th grade class. He contends that he and Baker attended a workshop conducted by Joseph Riley of the Board of Cooperational Educational Services on veneral disease and pregnancy among teenagers Sept. 23. Two days later, as indicated in his lesson plan, he asked his students to write a paragraph on their opinion of pre-marital sex. The next day, said Plano, school administrators objected to the assignment and Baker allegedly told Plano, "I want you to know that you are through here. I am asking the Board of Education to fire you Tuesday (Nov. 2)," Plano said in the formal complaint.

Baker asked Johnson for Plano's dismissal and following Johnson's recommendation, the board fired Plano in a 5-2 vote Nov. 2., effective Dec. 7.

The papers say that Plano was never given a hearing or chance to present his side of the issue. By denying him a hearing, NYSTA claims his right to free speech and academic freedom was violated.

Emphasizing that Plano was a probationary teacher, Baker has contended from that start that all rights guaranteed him were given. Baker was unavailable for comment this morning

The firing sparked a student protest on Dec. 7, forcing Baker to close school

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Utica, Saturday, Dec. 29, 1973 The Observer-Dispatch—5

Lawsuit Filed In Plano Case

A federal court lawsuit has been filed in behalf of an Ilion resident who was recently fired by the Westmoreland Board of Education, allegedly because he assigned a compositon on pre-marital sex.

The papers filed with Chief Deputy Clerk James K. Evans of federal court asked that Francis C. Plano be reinstated in his position of English teacher, and for back pay and lawyers' fees.

The papers alleged that Plano's rights under the First and 14th Amendments of the Constitution have been violated.

Twenty-two defendants, which include school board members, Clifford Baker, supervising principal; F. Wright Johnson, school superintendent; the school district and district clerk Frank R. Meire, were served with the legal papers by U. S. Marshals Thursday.

Each defendant has 20 days in which to answer the charges.

Plano contends that he and Baker attended a workshop, conducted by Joseph Riley of BOCES on venereal disease and pregnancy among teenagers Sept. 23. Two days later he assigned the composition. The next day, school administrators objected to the assignment and Baker allegedly told Plano, "I want you to know that you're through here. I am asking the Board of Education to fire you Tuesday, (Oct. 2)" Plano said in the complaint.

Baker did ask for Plano's dismissal and Johnson recommended it to the board. Plano contends. The board voted to fire Plano as of Dec. 7.

The papers contend tht Plano was never given a hearing or a chance to present his side. By denying him a hearing, the board denied him his right to free speech and academic freedom Plano said.

Besides asking for immediate reinstatement, Plano has asked the federal court to assume jurisdiction over the case; a preliminary injunction against the school board and its employes and agents to stop them from interfering with his teaching methods, and for damages as may be determined by the court after a hearing.

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Plano Suit Is Filed

Utica Press
12-29-73

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APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Not All for Plano

By Betty H. Martin
RD 2, Rome

All too often, news coverage presents only one side of an issue, leaving the reader with a somewhat biased impression of the actual event. I feel this is the case in the recently publicized firing of Frank Plano, an English teacher at Westmoreland Central School.

What started as a simple dismissal of a non-tenured teacher has mushroomed into a "cause celebre," aided by news articles, editorials, letters and most recently, a "sit-in strike" by approximately 200 students.

I feel it is important for people to realize that there is another side to this issue, and that there are some citizens of Westmoreland, like myself, who believe the administration was entirely justified in its action.

Obviously, there may be a number of students who also support the school administration in their decision, as evidenced by the 600 students in grades seven through 12, who did not participate in the demonstration. Perhaps, more students would have liked to participate, and didn't, for reasons known only to themselves. Perhaps, some of those who did demonstrate, did so, not because they really believed in the "cause," but because the demonstration provided a welcome diversion from a routine day at school. Perhaps, some athletes were "fearful of being booted off their teams," and therefore, did not participate. However, it is also quite probable that some athletes were not "fearful" and simply did not participate, because they belonged to the majority group of the student body, who did not believe in the "cause," and therefore, were not sympathetic to the plans for disrupting normal school activities.

In every situation, there are opposing viewpoints. The Westmoreland School incident is no exception. People, therefore, should not assume that the school administration stands alone in its decision, because it definitely does not.

Utica Observer Dispatch Dec 20, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Joins dismissal protest

TO THE SENTINEL:

I feel that the Westmoreland School System is run entirely by a group of seven people, The Board of Education. The students are not free to express themselves without fear of disciplinary action. This results in a communication gap. I would like to point out that the students are also part of the school system and should be given the courtesy of being heard. When a teacher is going to be dismissed, the student body should be consulted, not insulted, as in the case of the sit-in on December 7, where the student dance and basketball game were taken away because the students protested the dismissal of Mr. Plano.

Mr. Plano only asked for the students' opinion on pre - marital sex, they were not required to engage in it in order to write about it. Likewise, one does not commit murder in order to write an opinion on murder. So why should people get uptight and dismiss an excellent teacher. Westmoreland School cannot afford to lose good teachers. Other good teachers will avoid employment in the Westmoreland School System, if the board continues to treat teachers in such an unfair way.

I was taught speed reading by Mr. Plano, for only three weeks. In that short time I found out that he is a highly intelligent man and a very dedicated teacher. In those three weeks that I attended Mr. Plano's class I became aware of the fact that I could (and did) improve my reading considerably in areas which I never knew existed. I hear that Mr. Plano has accepted a job at another school. If this is true then that school will benefit from his services which Westmoreland had (and I stress the word had).

It appears that this generation will never be free to discuss sex in its various forms, openly and frankly, without alarming some people.

The students peacefully protested Mr. Plano's dismissal, and they should be heard and considered, not disciplined. I would like to ask a question. The fair dismissal law is fair to whom? It surely wasn't fair to Mr. Plano.

A concerned student for good education.

KEITH SPLAIN,
7092 Coleman Mills Road

Rome Daily Sentinel
December 20, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Dec 18, 1973
Rome Daily Sentinel

— Today's mail —

Says school board unfair

TO THE SENTINEL:

I'm a freshman at Westmoreland School and I was in on the sit-in.

I feel the board didn't give Mr. Plano a fair chance at a five minute meeting. He was fired and they wouldn't even let him speak. I'm not the only one that feels this way. The board wanted Mr. Plano out and that's all there was to it. They didn't want to listen to him, the taxpayers or the students.

I also feel that the school broke two amendments, freedom of speech and freedom of the press. They wouldn't let the kids out to talk to the press and wouldn't let the press in to talk to the kids. When the kids were told to go and get on the buses, they could finally talk. What was the problem, what was the school so afraid of us saying anyway?

When we were made to leave the school building, (which I don't think was fair either), some of the kids forgot their coats. We were then marching around the front yard of the school trying to be heard. It really did get cold but do you think they would let us go in school and get our coats? Nope, they had to give us a hard time about that, too. Finally after we froze they decided to let a few in and let them get their coats. See how fair and reasonable they were with us. If half the kids get sick will the school still be unreasonable and not pay the bills.

This isn't the end. We are going to fight for Mr. Plano's rights as well as our own.

JOHN DAVIS,
6602 Bartlett Rd.

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Supports school board

TO THE SENTINEL:

All too often news coverage presents only one side of an issue, leaving the reader with a somewhat biased impression of the actual event. I feel this is the case in the recently publicized firing of Frank Piano, an English teacher at the Westmoreland Central School.

What started as a simple dismissal of a non-tenured teacher has mushroomed into a "cause celebre," aided by news articles, editorials, letters and most recently, a "sit-in strike" by approximately 200 students.

I feel it is important for people to realize that there is another side to this issue, and that there are some citizens of Westmoreland, like myself, who believe the administration was entirely justified in its action. Obviously, there may be a number of students who also support the school administration in its decision, as evidenced by the 600 students, in grades 7 through 12, who did not participate in the demonstration. Perhaps, more students would have liked to participate, and didn't, for reasons known only to themselves. Perhaps, some of those who did demonstrate, did so, not because they really believed in the "cause," but because the demonstration provided a welcome diversion from a routine day at school.

Perhaps, some athletes were "fearful of being booted off their teams," and therefore, did not participate.

However, it is also quite probable that some athletes were not "fearful" and simply did not participate, because they belonged to the majority group of the student body, who did not believe in the "cause," and therefore, were not sympathetic to the plans for disrupting normal school activities.

In every situation, there are opposing viewpoints. The Westmoreland school incident is no exception. People, therefore, should not assume that the school administration stands alone in its decision, because it definitely does not.

BETTY H. MARTIN,
RD2, Rome.

Rome Daily Sentinel. Dec. 17, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Mr. Plano, Teacher

by Jim Nelson
159½ Sanford Ave., Clinton

The actions of the Westmoreland Central School Board concerning the dismissal of Mr. Frank Plano are deplorable. It is typical of a backward view of education. Furthermore, their refusal to hold a hearing on the matter is dictatorial. It is more liken to a communist state, rather than our supporsed democratic nation. It is a view which, instead of preparing our young adults for life, shields them from the truth they deserve to know and molds them into a frame of mind the board deems fit.

A board may hire an individual with certain qualifications to teach in their school, but a board does not make a person a teacher. It is the students who dedide whether an indivudual is a teacher, or someone to whom they close their ears and minds with no desire to learn. Anyone who can command the respect Mr. Plano's students showed him as a true teacher.

I believe Mr. Plano should receive an apology and be re-instated immediately. The students of Westmoreland have decided they want Mr. Plano to continue as a teacher, an opinon I regard made with greater maturity than the school board has shown.

Dec 15, 1973 Observer Dispatch
Utica

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Westmoreland school board gives position on Plano dismissal

By JOHN S. STURBIN JR.

WESTMORELAND — It wasn't on the agenda, but the Frank Plano matter again took center stage during the early portion of the Westmoreland Central School Board of Education meeting Wednesday night.

Board president Mrs. James Romeo announced to the audience of about 70 persons, including 15 students, that the board wanted to clear the air concerning its position in the dismissal action.

Plano, a non-tenured 10th grade English teacher, was dismissed Friday, following a 5-2 board vote Nov. 2 during a special session. The board accepted a recommendation from District Superintendent F. Wright Johnson citing Plano as being uncooperative with the school administration.

Plano contended the action resulted from a homework assignment in which he asked students to write a paragraph on pre-marital sex.

The two and one-half page statement was read by board member James Plehn, who with member Howard Walker, had voted against the dismissal.

The statement cited "much misinformation" regarding Plano's dismissal, and explained "The supervising principal, Clifford Baker, after reviewing with the high school principal, Richard Stanley, the documentation of several other incidents involving this teacher in the 1972-73 school year, submitted an opinion to the district superintendent of schools that the services of the teacher should be terminated," according to three sections of the Education Law.

The statement said Plano was given notice of the recommendation of termination on Oct. 3, 30 days prior to the board meeting.

Plano then requested, within the 21 day limit outlined in the Fair Dismissal Law, a written statement giving the reasons for the dismissal recommendation. The statement said the request was received Oct. 10.

On Oct. 17, 1973, Plano was furnished with the reasons in a written statement, and on Oct. 26, the district clerk, Frank Melie, received a letter from Plano asking for a hearing with the board, Plehn said.

He continued "The teacher did not file a written response to the reasons with the district prior to the board meeting" — as stated in the Dismissal Law.

Plehn said "The board met in work session on Oct. 30 in order to thoroughly discuss this matter prior to the Nov. 2 meeting," repeating the statement for emphasis. He continued "The teacher delivered to each board member a written response on Nov. 1, one day before the board meeting, and spoke individually with some members of the board. The district clerk did not receive a copy from the teacher."

The board then voted Nov. 2 to terminate Plano's contract, effective Dec. 2. Notice of termination was given to Plano on Nov. 5.

The statement continued, "The board would like to point out that there is no authorization in the law whereby it is allowed to hold a hearing as part of the process for the termination of a probationary teacher's employment.

"Even though the teacher did not meet the requirements of the law in filing his response, the board members had available his response as noted above and used this information in reaching their decision.

"The board has received numerous communications both pro and con in regard to this action. All such communications were received by the board. The teacher's probationary period has been terminated, and he now has legal recourse if he desires to use it."

Mrs. Romeo then said the board would have no further comment on the matter, but would hear delegations from the floor.

Richard Palmer said, "Morale in the district is very low," and suggested that the board apply to the State Education Department "to do a complete, in-depth survey of the school to point out our strengths and weaknesses."

Wheeler Muller pointed out that Plano has lost his job, "the people's pleas have been ignored, and the students have lost their dance and ballgame. The school board did everything legally." He added that the board's denial of a public hearing should not be considered the end of the law.

Mrs. Fred Hawkins spoke out for the board, and said "Everybody feels that Plano was judged guilty without being tried. I feel that Mr. Baker and the Board of Education are being judged guilty without a trial." She said her 16-year-old son was in one of Plano's classes, but added "I don't feel my son is qualified to judge if a person is a good teacher per se."

Harold Wood also backed the board's position.

Lyn Parker, representative from the Student Council to the board, was told by Mrs. Romeo that no action would be taken against the 250 students who staged a sit-in Friday morning in protest of the firing, causing cancellation of classes.

The last person to speak from the floor, John Bart, asked "When are we going to stop reacting in this town? We needed a demonstration to get this (the board's explanation) in our hands. This appears to be the root problem in Westmoreland, and the problem starts with the board. The board seems to thrive on conflict.

"I hope the board reads what has happened here. We don't like to be dismissed curtly with our opinions. Hopefully, things will go uphill from here."

Melie said the board could not confirm that Plano has taken a teaching job in another district. Later in the session, the members approved the appointment of John Trela, Rome, to a five-year probationary position as high school English teacher, replacing Plano's vacant spot.

The session ended at 10 p.m., the shortest meeting this school year.

Rome Daily Sentinel

ME, N.Y., WED EVENING, DECEMBER 12, 1973

RT TWO PAGE 15

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

THE DAILY PRESS
Wednesday
Utica, December 12, 1973

School Explains Why Plano Was Dismissed

By JONAS KOVER

Westmoreland—The board of education at a public meeting last night explained its actions in the firing of probationary high school teacher Frank Plano last month.

A controversy over Plano's firing ranged from the day the board voted for dismissal Nov. 3. A citizens petition to maintain the teacher gathered over 300 signatures and 250 students walked out in protest last week.

The board's reason for the dismissal of Plano was read by James Plehm to more than 60 people who attended. One of the two board members who originally voted against the dismissal.

The statement began with: "There has been much information circulated regarding the termination of employment of a former Westmoreland probationary teacher and the procedure followed. The board of education takes this opportunity to summarize the processes and the actions."

"I don't think we will have any more releases" on the subject.

Baker

After the statement was read, Mrs. Mickey Romeo, board president said, "We would give no further comment regarding the subject matter just read by Mr. Plehn."

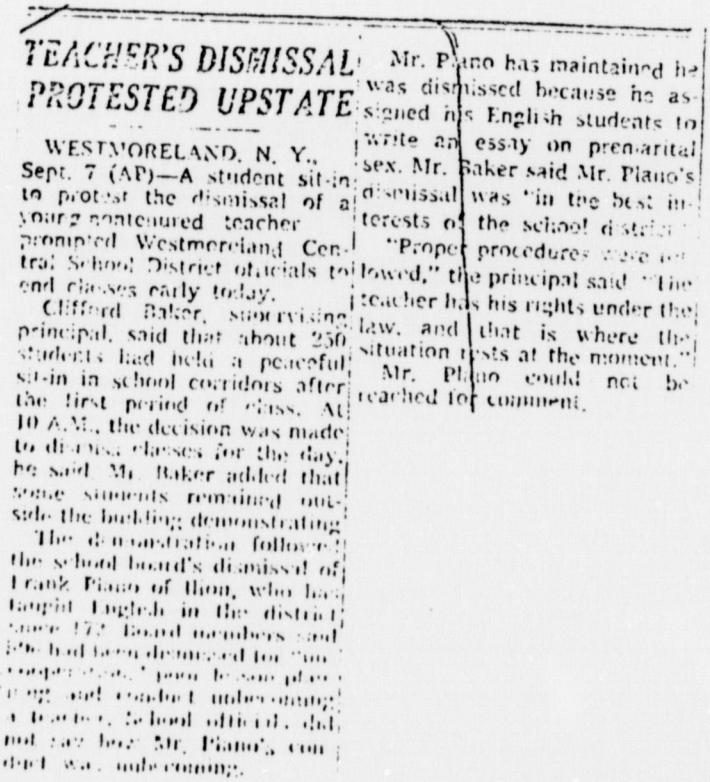
It said that the supervising principal and the high school principal received a formal complaint about an assignment given to students by the teacher. Plano had said on the date of dismissal that the assignment was to write a paragraph on one's opinions of pre-marital sex.

The statement said proper procedures were taken to dismiss Plano in accordance with the Fair Dismissal Law of 1972. Plano was notified 30 days before the dismissal meeting, and, by law, he was to file a written response seven days before the meeting.

Plano, instead, delivered a written response to each board member the day before the meeting. The district clerk did not receive a copy, the statement said.

Later, Clifford Baker, supervising principal, asked board approval for the hiring of John Trela as a probationary high school English teacher. Baker said Trela would fill the vacancy created by Plano's dismissal. He said he did not think there would be any more news releases from the board about Plano.

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT



TEACHER'S DISMISSAL PROTESTED UPSTATE

WESTMORELAND, N. Y., Sept. 7 (AP)—A student sit-in to protest the dismissal of a young nontenured teacher prompted Westmoreland Central School District officials to end classes early today.

Clifford Baker, supervising principal, said that about 250 students had held a peaceful sit-in in school corridors after the first period of class. At 10 A.M., the decision was made to dismiss classes for the day, he said. Mr. Baker added that some students remained outside the building demonstrating.

The demonstration followed the school board's dismissal of Frank Piano of Ilion, who has taught English in the district since 1972. Board members said he had been dismissed for "unsatisfactory performance and conduct unbecoming a teacher. School officials did not say here Mr. Piano's conduct was unbecoming.

Mr. Piano has maintained he was dismissed because he assigned his English students to write an essay on premarital sex. Mr. Baker said Mr. Piano's dismissal was "in the best interests of the school district."

"Proper procedures were followed," the principal said. "The teacher has his rights under the law, and that is where the situation rests at the moment."

Mr. Piano could not be reached for comment.

THE NEW YORK TIMES, SATURDAY, DECEMBER 8, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Utica Daily Press Dec. 7, 1973

No School Board Hearing for Plano?

WESTMORELAND—The Westmoreland Board of Education apparently will not conduct a hearing for Frank Plano, a nontenured English teacher scheduled to be dismissed today.

Mrs. Mickey Romeo, board president, said all seven school board members saw a petition signed by 350 residents, urging a hearing. But no one responded, she said when she asked if the members wished to do anything about the petition at a work session Tuesday night.

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Petition protests teacher dismissal

WESTMORELAND — A citizen's petition urging a hearing for Frank Plano, 10th grade teacher at Westmoreland Central School who is to be dismissed Friday, was presented to Board of Education President Mrs. James Romeo prior to an executive work session Tuesday night.

The document, containing the names of 360 district residents, was delivered by Beth Whitaker, a spokesman for the Concerned Citizens group. The petition reportedly objected to the manner in which Plano, a non-tenured English teacher, was dismissed.

But as far as the board is concerned, the matter is closed.

According to Clifford Baker, supervising principal, the board met to discuss "personal matters," and said that Donald Mattis, president of the Westmoreland Teacher's Association (WTA) was invited to attend. He had no comment on the substance of the session.

Plano was notified of his dismissal during a five-minute special meeting Nov. 2. The board at that time accepted the recommendation of District Superintendent F. Wright Johnson to terminate Plano's probationary appointment, voting 5 to 2 in favor of dismissal. Board members Howard Walker and James Plehn, voted against the decision.

Plano has contended that the action resulted from a homework assignment in which he asked students to write a paragraph on their opinion of pre-marital sex.

Johnson charged Plano with uncooperativeness with the school administration; poor judgment in subject choice, assignments, and class discussion, and cited unsuccessful efforts by the school administrators in correcting these "deficiencies."

Mattis however, countered with a number of teacher evaluations covering a period from Oct. 3, 1972, to Sept. 20, 1973, which overall cited Plano as being an above average teacher. The only criticism in any of the reports, according to Mattis, was that Plano had not taken classroom attendance.

Since that time, Mattis has charged that Plano's dismissal was designed by the board to scare the WTA, whose membership includes about 25 per cent non-tenure teachers. Mattis first called for a "just and immediate hearing" for Plano during the board's regular meeting Nov. 10, but no such session has been held to date.

The board's next regularly scheduled meeting is set for Tuesday, Dec. 11, at 8 p.m.

Rome Daily Sentinel
ROME, N.Y., WED. EVENING, DECEMBER 5, 1973
PART TWO PAGE 17

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Man of high moral values

TO THE SENTINEL:

As a former student of Westmoreland School, I know Mr. Plano to be a man with the highest moral values whose ideas are unquestionable.

I don't know why he picked pre-marital sex as the topic for an assignment but he must have had a very good reason for doing so, and was not, as many people think, being a dirty old man trying to find out what girls do and don't do.

Although sex before marriage may not be a thing that people like to talk about, surely love before marriage is a very beautiful thing.

We live in a day and age when men go to the moon, not in the days when the Puritans laws ruled the land. We cannot and should not let this thing ruin a man's life and future career because we are afraid of the word sex. We should treat this incident with understanding, an open heart, and an open mind and not with hell's fire and brimstone.

If we help this man now we will help ourselves to a better future tomorrow.

RONALD P. DAVIS.
Bartlett Road.

Rome Daily Sentinel - Nov 27, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Evening Mail

Thoughts on School

By Mrs. Dorothy M. Jones
RD 1, Whitesboro

I guess it can be said that you can please most of the people some of the time, some of the people most of the time, but not all of the people all of the time. Such seems to be the situation in our little town of Westmoreland.

I had stated in a previous letter to the editor that I believe Westmoreland has a good, honest fair and reputable school board, with minor exception. This exception being a school board member who is a teacher, has a spouse as a teacher in our school system, and who, as I understand, is a union representative. In my opinion, this should be considered a conflict of interest. No door opens both ways at the same time.

About a year ago, at which time not all of the present board members were serving. I brought up the following incident to the board: My daughter, an 8th grade student brought home a paperback edition of a book that in some parts contained language and passages that I felt should not be included in an 8th graders available literature. This particular book was not signed out through the school library but rather through the 8th grade English teacher, to whom the book belonged.

I contacted the teacher and was told this book was on the best seller list and given the impression that it had been okayed by the head of the English Department. Not gaining much satisfaction there, I went to the then acting Supervising Principal and the Board. At that time I might as well have saved by breath as I was told by the board that they would get get back to me. I was sent the customary papers for filing a complaint pertaining to a book that I did not feel was proper for my child's reading. However, Knowing the book did not come from the school library, but rather from the teacher, I did not feel compelled to file such papers.

To date the closest I have to a satisfactory answer or to any kind of a conclusion, was having the new supervising principal threaten me with arrest if I walked out of the school with the book which incidentally I had walked in with. Since this incident, there have been newly elected members to the board who, as I mentioned above, were not present at the time of this matter. Perhaps this was only one of many lesser complaints brought before the board regarding certain subject matters at the school, who can say

Although I feel sharp and drastic decisions were made in the case of Mr. Plano, I should think, in view of the fact it was on the recommendation of Mr. Wright Johnson that he be dismissed, negotiations for reinstatement should be made with Mr. Johnson's offices and not the school board. In this way perhaps his recommendation could be reversed and recommendation for reinstatement should be made through him. However, I would like to add that I, for one, am glad that our present board is awake enough to be concerned for the ones who matter the most, the students.

In regard to Mrs. Whitaker's letter of Nov. 10, she wrote that she would be thankful for a "teacher, minister, or neighbor" to whom her children could turn if they felt they could not discuss their problems with her. To this I say, I personally would consider myself a pretty "truant" parent if my children felt they could not turn to me with their problems, big or small. I believe also that the teacher Mrs. Whitaker referred to as "finally exonerated of the drug raid set-up" is still teaching in our school system and has not left.

To Mr. Mattis' letter of Nov. 15, 1973, he wrote that to deny justice to any "employe of this school district" denies justice to all of us. Does denial of justice apply only to "school employes?" In my opinion, any complaint, be it from a party of one or a party of more than one warrants the same justification be it school employe or otherwise.

With the PTA and WTA associations in our small town, perhaps it is time to form an SPA (Student Parent Association) whereby the students and parents could air their views in public.

As long as the majority of our present school board continues to seek betterment for all, and has the utmost consideration for our "people of tomorrow," the students, I am sure that they will continue to have the support of many behind them.

Utica OD
Nov. 23, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

— Today's mail —

Sees confidence restored

TO THE SENTINEL:

A trend in school education at Westmoreland Central of liberalism and permissiveness was introduced under the disguise of academic freedom which has run rampant and out of control. Academic freedom was never a mandate for teachers to shirk their responsibilities and condone wrong conduct, whether the acts be committed by students or faculty themselves. As a result, a consequence happened — dismissal of a teacher.

Much publicity has been given this incident. The people of Westmoreland have read in the papers statements that the WTA made in defense of the teacher. Nothing about this person's conduct that led to his dismissal, or inquiries into the matter. The WTA quickly comes to the defense of one of their own, saying to the school board and the people of Westmoreland that morals are not sufficient grounds for dismissal. Where the WTA is concerned, teachers are above reproach, to be reprimanded is unthinkable. But they make a grave error of judgment. They are held accountable for their conduct and performance as a teacher, to the school administration, school board, and last but most important, the people of Westmoreland.

A school board finally has the courage and moral fiber to take a stand and demonstrate to the people of Westmoreland that moral decay has gone far enough and cannot be a part of the Westmoreland School system any longer. Now a school board finally serves notice to the WTA and any other teacher wishing employment in the Westmoreland school system that Westmoreland will not tolerate any longer teacher abuse of morals or selfish endeavor. Westmoreland is striving for a better educational environment which doesn't include moral decay, a disease which breeds distrust, disrespect, irresponsibility, violence and student unrest.

Westmoreland is undergoing a transformation which points in one direction only, upward. This is being done to elevate morals as well as academic standards, which have been in a steady decline. This effort is possible only as a result of a concerned administration and school board. A large portion of the people in Westmoreland, if not the majority, applaud and praise this action taken by these people.

Certainly, confidence is being restored and regained.

FRED LOSOWSKI,
RD 1, Dix Rd.

Nov 21, 1973
Rome Daily Sentinel

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Says dismissal justified

TO THE SENTINEL:

There are always two sides to every question, as is the case in the dismissal of Francis Plano, tenth grade teacher in the Westmoreland school system.

I belong to the "older generation" and no doubt am considered "old fashioned." I am interested in the situation because I have three grandchildren in the school.

I was horrified that a class of high school students was asked to write on pre-marital sex. With a wide range of subjects that the class could have written on to show their literary ability, why did Mr. Plano pick that particular one?

Sex is God's plan to populate the earth, which includes every living creature. Let us place the responsibility of teaching and discussing sex where it belongs, with the parents in the home. Of course we want our young people to become independent, to think and speak for themselves, but should teenagers be put completely on their own? Doesn't the experience of older people count for anything? Surely the younger generation needs guidance as they grow up.

When I was a teenager the subject of sex was never discussed. That was not good. The pendulum has swung too far the other way. Today sex is talked about as casually as the weather or current topics. I think there is a happy medium which we should strive for. In my opinion the "good old days" were far better than the permissiveness allowed today. I commend the Board of Education for their course of action and sincerely hope that they will not swerve from that course.

MRS. VERNON M. BROWN,
116 W. Court St.

Rome Daily Sentinel Nov 20, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

THE DAILY PRESS
friday
Utica, Friday, Nov. 16, 1973 ★★Page -19

Good Morning

DAVID WEIDERMAN
809 Mulberry St.
Utica
Stockclerk

. . have a wonderful day

Differences Widen At Westmoreland

By JAY REINER

WESTMORELAND—A rift between the Westmoreland Board of Education and the Westmoreland Teachers Association (WTA) has been widening over the past month.

One of the key differences is the Nov. 2 dismissal of Francis Plano as a high school English teacher, because, he said, of an assignment on pre-marital sex.

The board released a six-page reply to a WTA criticism, delivered at the October board meeting, dated Oct. 9. The reply was hand-delivered to WTA President Donald Mattis by Frank R. Melie, business manager. A copy of the reply became available during an interview with Mattis this week.

According to Micky Romeo, board president, all board members participated in drawing up the reply. Board member Howard Walker said last night he never had time to go over the reply and said he had "some differences" with it.

Differences between the teachers—and some residents—and the board grew wider at Tuesday's board meeting when several were refused an opportunity to speak on Plano's case.

Plano had been dismissed by a 5-to-2 vote, with Walker and James Plehn voting against dismissal.

Mattis had charged that the dismissal was more of a reprisel or harassament of the WTA to whip into line teachers who were nontenured.

The board's reply charged that the WTA had "littl respect" for the personal feelings of board members, objected to WTA criticism directed at Clifford Baker, supervising principal, and that it did not find it easy "to sit in meetings and possibly endure this abuse."

Plehn said Wednesday that the reply was not intended to be made public, although copies were sent to all the teachers.

Walker questioned the wisdom of the reply, noting that it might promote more hostility.

He said he received a draft of the reply from Baker on Oct. 5, asking that he look it over, add his comments and respond by Oct. 6. Because of other commitments, he said, he did not have the time and did not see the final draft until the night of the meeting.

He added that at no time had he expressed any feeling to other board members that he agreed or disagreed with the reply.

The board said that WTA complaints that teqachers were being harassed "is not worthy of consideration unless the individual teachers complaining are willing to specify their problems."

The board also blamed the WTA for any morale problems because private and public comments by the union were "misleeding and, at times, completely false."

The board, in the past, had been reluctant to talk publicly about criticisms directed at it by the WTA.

On matters such as Plano's, case, or the board's refusal to rehire a teacher's side in October, board members and Baker have said no public comments could be made because the personnel records of employes were confidential.

The WTA has charged that much of the problems between the board and its administration and the WTA dates back to the hiring of Baker on July 1, 1972.

Mattis has said that some teachers were afraid to teach in certain areas, or even come out with new ideas for fear reprisals would be taken against them—especially in the case of nontenured teachers.

The board criticized picketing by the WTA before the October meeting, saying it was "unprofessional."

One nontenured teacher who was picketing said she was upset when Baker took her picture while she was picketing. There have been no attempts to take any kind of action against her since that time, Mattis said, when questioned Wednesday.

Walker said some attempts have been made to promote a better working relationship between the teachers and the adrainistration through meetings with small groups of teachers.

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Facts on Mr. Plano

Without going into the pro-con background of the controversial Frank Plano case in Westmoreland, it now appears obvious that the school board does not intend to share information with residents of the school district.

Mr. Plano is a 24-year old 10th grade high school teacher in the Westmoreland system. He has been employed for two years. He says he was fired because he gave a class an assignment on the subject of premarital sex. He says the school principal was aware of his lesson plan. School board members, who voted 5-2 for dismissal on Nov. 2, said in a statement that Mr. Plano had been "demanding and uncooperative."

Teacher disputes and dismissal action are not uncommon in school districts. In this Westmoreland case the fundamental question is not what Mr. Plano did or did not do but the right of school residents to hear discussion and to judge the facts. By saying that the board acted "because we felt this was the best thing to do" or that personnel records are by law a private matter, rumor and gossip about a young man just starting his profession are encouraged.

The Westmoreland Teachers Association, which is backing Mr. Plano, has asked that he be given "a just and immediate hearing." Surely, this is a reasonable, fair request.

Utica Observer-Dispatch 11/16/73

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Defends teacher dismissal

TO THE SENTINEL:

There has been quite a lot of discussion concerning Mr. Plano's dismissal from the Westmoreland School Teaching Staff. Let us look at the facts of this case realistically.

What is the issue and what do we parents want for our children?

The issue as stated is that when objections were made by some parents concerning their children writing an an immoral subject for an English assignment, the administration talked at length with the teacher and asked him to not use this subject for class compositions. Mr. Plano objected and refused to follow the request of the administration and the school board. Are we going to allow rebellion to continue among the teachers against authority? Is this the example we want our children to follow? Is morality important or are teachers' rights to overthrow authority their right? What have our teachers been teaching our students by such actions?

I know that this is the second time within a three week period that the students were given a chance to write on sex in this class. The course is titled "Basic English." Is sex considered a basic English subject? There are other moral issues such as cheating in school that could be written about, in which the teacher could be helpful and not overstep such a personal opinion.

Everybody knows that this is immoral even if premarital sex has become questionable to some people and where does Mr. Plano stand on this subject.

I certainly hope that insubordination does not overtake a stand for good morals and good purposes.

MRS. CARL SMITH,
RD 1,
Westmoreland

(Rome Daily Sentinel) 11-15-73

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Teacher's Reinstatement Urged at Westmoreland

WESTMORELAND — The Westmoreland Teacher's Association went on record last night urging the reinstatement of Frank Piano a junior-senior high school English teacher who was dismissed at a special board session Nov. 2.

The stand was made known at the public portion of the meeting by Donald R. Mattis, WEA president. Mattis said, "We insist that the board of education reconsider the dismissal, and grant Mr. Piano a just and immediate hearing."

Mattis criticized the board for taking action without conducting a full investigation. "Our investigation of the matter indicates that the total support of Mr. Piano is not merely mandated by our concern for a fellow teacher, but clearly mandated if we wish to uphold the principle that children in this school district deserve and are entitled to the best education that the school can provide."

Plano claims he was dismissed because of a homework assignment on the topic of pre-marital sex. He has been with the Westmoreland faculty since 1972.

(Utica Daily Press) 11-14-73

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Nov 10, 1973 Utica Daily Press

Dismissed Teacher: Well Rated

By JAY REINER

WESTMORELAND—A Westmoreland Central School teacher who claims homework assignment on pre-martial sex caused his dismissal says he had a good rating from his department chairmen in an evaluation a week after the assignment.

Donald R. Mattis, Westmoreland Teachers Association WTA president, said he feels that the "real reason" for the firing of Francis Plano was to scare approximately 25 per cent of the teachers who are non-tenured.

Plano joined the faculty in 1972.

During the picketing before the October school board meeting one non-tenured teacher expressed concern because Supervising Principal Clifford Baker took her picture with a picket sign.

Baker was reportedly in Albany yesterday and not available for comment.

SCHOOL BOARD President Micky Romeo said last night it was the board's belief, under advisement from its attorney, that the board should not bring out material from a teacher's personnel file, unless the teacher does so first.

Plano, before his dismissal at a special Nov. 2 board session, said he had requested a private hearing with the board. It was reported that he attempted to speak during the public meeting when the vote was taken on his dismissal, but reports differ on

personnel file, unless the teacher does so first. NDC

Continued 13

Plano, before his dismissal at a special Nov. 2 board session, said he had requested a private hearing with the board. It was reported that he attempted to speak during the public meeting when the vote was taken on his dismissal. But reports differ on how he was denied. Baker said he never heard the request, but board member Howard Walker said Plano asked several times but was denied by Mrs. Romeo.

Plano responeded to the charges of his dismissal in a letter which he delivered to board members Nov. 1.

The charges were contained in a letter dated Oct. 16, signed by Baker and approved by F. Wright Johnson, district Superintendent of Schools.

THE LETTER said Plano was being dismissed because:

"You have been demanding of and uncooperative with the school administration; (2) you have shown poor judgment in your choice of subjects for assignments and classroom discussion; (3) efforts on the part of the school administrators to correct your deficiencies through discussions with you have been unsuccessful."

Plano said in his letter he did not feel he had been uncooperative because he had taken a speed reading course at his own expense so he could teach it to pupils.

He said he introduced a new remedial reading course in the English curriculum, accepted extra duties as junior high wrestling coach, assistant track coach last spring, worked at basketball and football games, chaperoned dances without reimbursement, accepted a seventh assignment in excess of the contract regulation and gave up a lunch hour to take another extra class last year.

—Two reports [illegible] Stanley High school [illegible] both on Sept. 20, 1973. In one where items were to be checked satisfactory or unsatisfactory, all were checked satisfactory, but Stanley added a disapproving note: "attendance not taken."

On an evaluation form made once a year on teachers, everything was checked above the average line for Plano, except one item which was on the average line. The only criticism was that attendance was not taken.

ON THE CHARGE that attempts to correct deficiencies had failed, Plano said that he had never been told of any and to the contrary had been told his performance was satisfactory.

Plano contends that the major reason for his dismissal is that he assigned pupils to write an essay on pre-martial sex.

Plano said this type of assignment was encouraged at a Board of Cooperative Educational Services In-Service workshop that he attended.

ONLY COPY AVAILABLE

IN ANSWER to the "poor judgment" charge Plano cited these evaluations:

--On Oct. 3, 1972 by Pam Murphy, English Department chairman, three items checked fair, nine "good" and three "very good."

On May 9, 1973, again by Pam Murphy, four were checked "fair," six "good" and six "very good," and on Oct. 2, 1973, by Pam Murphy, one item was checked "fair," eight "good" and five "very good."

- On Nov. 9, 1972, Robert C. DeLong, now director of pupil personnel services and the acting high school principal, said of Plano: "His room is neat; well organized in spite of being overcrowded (small room), and he had made effective use of bulletin and blackboard . . . (Plano has) "particularly impressed with his ability to involve the slow students in the discussion."

DeLong climaxed his comment with "good instructor and has the potential of becoming an outstanding teacher."

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Speaker Explains BOCES Success; Shoemaker, Lennon Are Honored

By BARBARA CHARZUK

Dr. Leo A. Soucy, assistant commissioner of education for school services, last night attributed the "secret success" of the Board of Cooperative Educational Services (BOCES) to its sensitivity.

Dr. Soucy was the main speaker at the First Supervisory District's silver anniversary dinner in Hart's Hill Inn, Whitesboro. About 275 persons attended.

Soucy said BOCES is a system "sensitive to the needs of local school districts and the state agencies, Regents and (education) commissioner."

He compared the BOCES status in the state educational picture as a "half-way house." Combined budgets for the state's BOCES districts total $200 million.

The 11 component school districts in the First Supervisory District have an enrollment of about 21,000 pupils and combined operating budgets of more than $27 million.

Soucy said the future of BOCES "hasn't been scratched," citing its move into drug and veneral disease education.

DISTRICT SUPERINTENDENT F. Wright Johnson also noted the district's development and expansion of services. Johnson said the district was formed in 1948 for school districts to share itinerant services. BOCES has grown into a "vehicle for programs and services," Johnson said.

Two men who played key roles in BOCES' development were honored. Tribute was paid to Elwin Shoemaker, district superintendent of schools for 34 years, and Harold Lennon, a charter member of the Cooperative Board and a member for 25 years.

Shoemaker and his wife, Ruth, traveled from their home in Phoenix, Ariz., to attend the event. Shoemaker retired in 1967.

Lennon presented a plaque to Shoemaker, noting his foresight, effort and leadership in the formation of BOCES. In his acknowledging remarks, Shoemaker said he felt that he was home and could feel the sincere warmth of the audience.

Shoemaker said the board demanded that teachers, school board members and administrators work together for something they believed in and for which they were willing to sacrifice.

Cooperative Board President William Bellinger awarded Lennon a plaque for his 25 years as a board member and nine years as its president. Lennon retired earlier this year to devote more time to his jewelry business in Florida.

Bellinger called Lennon a "gem" of a fellow and a "diamond in the rough." Lennon also had served on the Whitesboro Board of Education for 15 years.

Other "pioneers"—school board members and BOCES staff at the time of its formation in 1948—also were recognized.

(Utica Observer - Dispatch

Nov 9 - '73

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

— Today's Mail —

Teacher unit backs Plano

TO THE SENTINEL:

Last night (Nov. 2) I attended a Board of Education meeting in Westmoreland. A second - year teacher was being considered for dismissal. He had been denied a private hearing with the board to explain his side of the controversy. He made a request, at the public meeting, to speak. This, too, was denied him. After his request was denied, the board immediately voted on the motion to dismiss, and promptly adjourned. His fellow teachers were appalled at this travesty of justice.

I had attended the meeting as spokesman for the Westmoreland Teachers Association. The teachers felt it very important that our statement be made a part of the board's records. Now that the event is past, we appeal to the news media to print our statement:

"We the teachers of the Westmoreland Central School District, urge the board, in the case of Frank Plano, to grant him an immediate hearing. Simple justice demands that a person be allowed to reply to his accusors. To deny this justice to any employee of this school district denies justice to all of us.

"We totally support Mr. Plano in this action. He has worked cooperatively and well with the students and faculty of this school. We wish to continue to work with him. His talent and expertise as a teacher are documented in his evaluations. We urge you to consider our support before you make a final judgment in this action.

"We will continue to support Mr. Plano through our local association, the New York State United Teachers, the National Education Association, and the American Federation of Teachers AFL-CIO."

DONALD R. MATTIS,
President, Westmoreland
Teachers Association.

(Rome Sentinel)
11-6-73)

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

WTA Plans to File Protest of Firing

WESTMORELAND—Donald R. Mattis, president of the Westmoreland Teachers Association (WTA), said last night a grievance will be filed to protest the firing of a Westmoreland High School teacher.

Frank Plano, 28, of 11 Michigan Ave., Ilion, was dismissed as a 10th grade teacher in a five-minute special school board meeting Friday.

The board alleged that Plano had been demanding and uncooperative with the school administration and had shown poor judgment in choice of assignmentsn

The vote was five in favor of dismissal and two opposed.

Howard Walker, who cast one of the negative votes, praised Plano and attacked the board for using what he said were discriminatory standards.

According to Plano, cause for dismissal centered around a homework assignment he gave to his two classes of 20 pupils each in September. They wre asked to write a paragraph on their opinion of pre-marital sex.

The idea was to develop good topic sentences on something the students had an opinion on, Plano said.

He said the topic was motivated by an in-service meeting at the school, in which teachers were encouraged to counsel students and be aware of their thoughts on such topics as venereal disease and teen-age pregnancy, Plano said.

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MATTIS SAID LAST night he would meet today with high school principal Richard Stanley. He said that meeting would be the first step in the filing of a grievance.

Plano has done a good job, Mattis said, and has received support from parents.

In a statement released in behalf of the WTA, Mattis said:

"We urge the board . . . to grant an immediate hearing. Simple justice demands that a person be allowed to reply to his accuser."

"We totally support Mr. Plano in this action. He has worked cooperatively and well with the students and faculty of this school . . . His talent and expertise as a teacher are documented in his evaluations."

Mattis said the organization will support Plano through the state United Teachers, the National Education Association, and the American Federation of Teachers, AFL-CIO.

(Utica Daily Press)
11-6-73

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

Did Assignment Cause Firing?

By JONAS KOVER

WESTMORELAND — Did a homework assignment on pre-marital sex cause a Westmoreland High School teacher to be fired?

Frank Plano, 24, of 11 Michigan Ave., Ilion was dismissed as a 10th grade high school teacher in a five-minute special school board meeting yesterday afternoon.

The board listed reasons for dismissal in a written document stating that Plano has been demanding and uncooperative with the school administration, had shown poor judgment in choice of assignments and classroom discussion and was unsuccessful in correcting his deficiencies.

The vote was 5 to 2 for dismissal, with board members James Plehn and Howard Walker casting the negative ballots.

Walker, in a prepared statement, commended Plano as a school teacher and attacked the board for using discriminatory standards and encouraging conformity rather than individualism.

Plano said that he had tried to speak at the brief meeting but was denied the floor.

Supervising Principal Clifford Baker, who would not comment on any matter concerning the case, said that he did not hear Plano's request to speak.

Walker, however, said "he asked two or three different times to speak after the motion was on the floor. . . and was denied by the board president, Micky Romeo."

According to Plano, the cause for dismissal centered around a homework assignment he gave to his two classes of 20-pupils each in September, asking them to write a paragraph on their opinion of pre-marital sex.

The topic was motivated by an in-service meeting two days previous at the school where teachers were encouraged to counsel students and be aware of their thoughts on such topics as venereal disease and teen-age pregnancy, Plano said.

The meeting, which was required attendance for the teachers, was taught by BOCES personnel and attended by the supervising principal, Plano said.

The next week Plano said that he turned in his lesson plan to the high school principal. The plan contained the written assignment he proposed to have the class do. Nothing was said then, according to Plano.

The day that the assignment was due, Plano was called into Baker's office and told "You're through here. I want you to know that I'm recommending your termination to the Board of Education," Plano quoted Baker.

The supervising principal said yesterday that the teacher was given reasons for dismissal in private and Plano was told he could write a rebuttal in accordance with the Fair Dismissal Act.

Plano said that the reasons were vague and that he sent a letter to the board indicating they were vague and misleading. He requested that he be allowed to talk to the board in private, he said.

The request was ignored and he then wrote a five page document and hand delivered it last night to each board member, he said.

Plano said that Baker told him that the assignment on pre-martial sex was the reason for his dismissal.

In Plano's statement to the board he said that if he knew the administration was against such an assignment, then he would not have done it.

Walker's statement in defense of Plano read in part:

"We encourage freedom of expression from our students and in the same breath ostracize teachers who have the courage to be different to express their views and demonstrate the firmness of their convictions.

"It is my own feeling that we should encourage all individuals to express themselves in their own unique way within the framework society has established. I feel Mr. Plano has done this and should not have his professional career jeopardized.

". . . I would like to go on record as commending Mr. Plano for the job he has done here at Westmoreland. . ."

Plano is a graduate of Colgate University. He has taught at Westmoreland, his first professional teaching assignment, for two years.

Utica Observer Dispatch

November 21, 1973

APPENDIX "2", ATTACHED TO
PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT

High school teacher dismissed by Board

WESTMORELAND — Francis Plano, 24, of 11 Michigan Avenue, Ilion, a 10th grade Westmoreland Central High School teacher, was dismissed by the Board of Education during a five - minute special meeting convened at 5:30 p.m. Friday.

According to Frank Melie, business manager, "the board accepted the recommendation of District Superintendent F. Wright Johnson to terminate the probationary appointment of Francis Plano." The vote was 5 to 2, with members Howard Walker and James Plehn voting against the dismissal.

The dismissal is effective Dec. 7, 1973, Melie said.

Other school officials and Plano could not be reached for comment this morning. However, the dismissal reportedly involves a homework assignment Plano gave to his classes in September, calling for them to write a paragraph on their opinion of pre-marital sex.

Walker issued the following statement in defense of Plano: "One of the areas of concern of this Board of Education has been on the topic of conformity. It seems to be, if I'm accurate in my assessment, the feeling of the board that students have too long been asked to conform to antiquated standards and are now allowed to express their individual unique qualities and abilities. We degrade unnecessary conformity and condone reasonable freedom of expression. I find it deplorable that we should operate this school using such discriminatory standards.

"We encourage freedom of expression from our students, and in the same breath ostracize teachers who have the courage to be different, to express their views, and demonstrate the firmness of their convictions. It is my own feeling that we should encourage all individuals to express themselves in their own unique way within the framework society has established. I feel Mr. Plano has done this, and should not have his professional career jeopardized. I also feel that Mr. Plano has been an individual who felt strong enough about his convictions to stand up and express his feeling even though it did not conform to expected behavior. How will we ever teach young people to express themselves if we don't permit our professional educators to do the same?

"I would like to go on record as commending Mr. Plano for the job he has done here at Westmoreland, and it is my fervent wish that this experience does not force him to waver from his convictions."

Speaking in Rochester

Dr. Lola Harrison of Rome will speak Sunday afternoon at Holy City Church of God in Christ, Rochester, during special services there. An evangelist and fund raiser, Dr. Harrison's theme will be based on the Biblical

Nov 3, 1973 Rome Daily Sentinel

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	SUPPLEMENTAL AFFIDAVIT Civil Action No. 73-CV-562

STATE OF NEW YORK)
: ss.:
County of Oneida)

CLIFFORD W. BAKER, being duly sworn, deposes and says:

1. That he resides at Creaser Road, Westmoreland, New York, is the Supervising Principal of Westmoreland Central School District, and is a defendant in the above-entitled action.

2. That he previously submitted an affidavit dated January 15, 1974, in this matter.

3. On May 22, 1973, the Plaintiff presented a letter to me offering his services as advisor to the School newspaper but only under the condition "that the regular school budget finance the newspaper and all necessary

functions related to its publication" (see Exhibit "1" attached hereto). Plaintiff was advised by me that it was not possible for the taxpayers to finance the School newspaper. At the next public meeting of the Board of Education, Plaintiff persisted and was advised by the Board of Education that this financing was not possible. Thereafter, a petition in which the Plaintiff was involved was filed with the Board of Education, which petition persisted in asking for financial support from the taxpayers for the School newspaper. At this time, I had a complaint from the Vice President of the Student Council as follows: "Mr. Plano is giving me a hard time because I won't support his request for funds" for the student newspaper.

4. On June 12, 1973, I, while eating lunch in the School cafeteria, asked the Plaintiff to come to my office for a personal conference during a free period that afternoon or after school. Plaintiff stated flatly that he would not go to my office and insisted before a number of persons eating in the cafeteria to be told then and there why I wanted to see him. Although I attempted to make clear that the matter was personal, the Plaintiff persisted in demanding that the matter be discussed then and there. I then did state to the Plaintiff my reason for requesting the conference (to advise that Plaintiff would not be recommended as advisor to the newspaper), and Plaintiff thereupon became belligerent and boisterous.

5. During the 1973 summer recess, on the first day of work in the Westmoreland Central School District for a newly hired High School Principal, the Plaintiff came to this Principal's office asking for $250.00 to fund a summer writing project, of which no one on the Board or in the Administration (including Plaintiff's Department Chairman whom the Plaintiff knew full well must give prior approval and who was in fact the proper person to

make any such request of the Administration and Board) had any knowledge.

6. On September 25, 1973, Plaintiff assigned the writing of a composition on the topic "Premarital Sex" to his English students, a group consisting of 20 sophomores, 10 juniors and 1 senior, ranging in age from 14 years upwards. Parental reaction by way of complaints to me were immediate and numerous. Plaintiff totally failed to cooperate with me in connection with discussing the problem which had arisen because of these complaints.

7. Students complained to me that the Plaintiff was swearing in class. Plaintiff received a verbal reprimand from the High School Principal.

8. Subsequently, the following statements were made to me by students:

> "All he wants to do is talk about sex."
> "He tells us jokes you can take either way and then grins knowing which way we take them."
> "He told us the joke about the 3 bears. We heard it already. Besides who wants to hear it from a teacher."
> "He is a good English teacher."
> "The sooner he is gone the better."

9. It has been brought to my attention by counsel that through a typographical error in my Answer as an individual, it appears that I failed to answer paragraph 22 of Plaintiff's Complaint. In fact, paragraph 7 of my Answer as an individual should read as follows:

> "7. With regard to the allegations contained in Plaintiff's Complaint marked and numbered paragraph 22, Defendants ADMIT (except Defendant Baker who admits upon information and belief) the allegations contained therein, except that all Defendants DENY the last sentence of said paragraph."

Subscribed and sworn to before me
this 29th day of January, 1974.

/s/ Clifford W. Baker
(Clifford W. Baker)

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

EXHIBIT "1", ATTACHED TO SUPPLEMENTAL
AFFIDAVIT OF DEFENDANT BAKER

May 22, 1973

MEMO To: Clifford Baker - Supervising Principal

From: Frank Plano - Junior English

Subject: School Newspaper

It has come to my attention in the past few weeks that there may be a vacancy for the position of Newspaper Staff Advisor for the 1973-74 school year.

If the above is true, I would like to offer my services for the position, but under the following condition only:

"that the regular school budget finance the newspaper and all necessary functions related to its publication."

While I recognize the financial stress under which this system is presently functioning, I find it a deplorable situation that the present newspaper staff must spend most of its time raising funds rather than publishing a newspaper. This seems to me a situation wholly unrelated to the educational purposes for which the activity was originally intended. Finally, I wish to applaud the efforts of the present staff and their advisor, Mrs. Slater, and hope to see the paper continue to improve in quality as it has throughout this school year.

cc: Marilyn Slater
Robert Delong

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

SUPPLEMENTAL AFFIDAVIT

Civil Action
No. 73-CV-562

STATE OF NEW YORK)
: ss.:
COUNTY OF ONEIDA)

JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, and MICKEY ROMEO, being duly severally sworn, depose and say:

1. That they reside at RD #1, Whitesboro, New York; Westmoreland, New York; RD, Whitesboro, New York; Westmoreland, New York; RD #2, Rome, New York; and RD, Clinton, New York, respectively, are members of the Board of Education of the Westmoreland Central School District, and are defendants in the above-entitled action.

2. That they previously submitted affidavits dated January 14, 1974, in this matter.

3. It has come to our attention that the Plaintiff is contending that he was dismissed as a teacher in the Westmoreland Central School District either for a single incident and/or because of "rumors". The reasons that the Plaintiff was dismissed were as stated in Exhibit "H" of his Complaint herein.

4. The matters considered in reaching the decision to dismiss were as follows:

(a) On May 22, 1973, the Plaintiff presented a letter to the Supervising Principal offering his services as advisor to the School newspaper but only under the condition "that the regular school budget finance the newspaper and all necessary functions related to its publication". Plaintiff was advised by the Supervising Principal that it was not possible for the taxpayers to finance the School newspaper. At the next public meeting of the Board of Education, Plaintiff persisted and was advised by the Board of Education that this financing was not possible. Thereafter, a petition in which the Plaintiff was involved was filed with the Board of Education, which petition persisted in asking for financial support from the taxpayers for the School newspaper. At this time, the Supervising Principal had a complaint from the Vice President of the Student Council as follows: "Mr. Plano is giving me a hard time because I won't support his request for funds" for the student newspaper.

(b) On June 12, 1973, the Supervising Principal, while eating lunch in the School cafeteria, asked the Plaintiff to come to his office for a personal conference during a free period that afternoon or after school. Plaintiff stated flatly that he would not go to the Supervising Principal's office and insisted before a number of persons eating in the cafeteria to

be told then and there why the Supervising Principal wanted to see him. Although the Supervising Principal attempted to make clear that the matter was personal, the Plaintiff persisted in demanding that the matter be discussed then and there. The Supervising Principal then did state to the Plaintiff his reason for requesting the conference (to advise that Plaintiff would not be recommended as advisor to the newspaper), and Plaintiff thereupon became belligerent and boisterous.

(c) During the 1973 summer recess, on the first day of work in the Westmoreland Central School District for a newly hired High School Principal, the Plaintiff came to this Principal's office asking for $250.00 to fund a summer writing project, of which no one on the Board or in the Administration (including Plaintiff's Department Chairman whom the Plaintiff knew full well must give prior approval and who was in fact the proper person to make any such request of the Administration and Board) had any knowledge.

(d) On September 25, 1973, Plaintiff assigned the writing of a composition on the topic "Premarital Sex" to his English students, a group consisting of 20 sophomores, 10 juniors and 1 senior, ranging in age from 14 years upwards. Parental reaction by way of complaints to the Supervising Principal and members of the Board of Education were immediate and numberous. Plaintiff totally failed to cooperate with the Supervising Principal in connection with discussing the problem which had arisen because of these complaints.

(e) Students complained to the Supervising Principal that the Plaintiff was swearing in class. Plaintiff received a verbal reprimand from the High School Principal.

(f) Subsequently, the following statements were made to the Supervising Principal by students:

"All he wants to do is talk about sex."

"He tells us jokes you can take either way and then he grins knowing which way we take them."

"He told us the joke about the 3 bears. We heard it already. Besides who wants to hear it from a teacher."

"He is a good English teacher."

"The sooner he is gone the better."

5. It has been brought to our attention by counsel that through a typographical error in our Answer as individuals, it appears that we failed to answer paragraph 22 of Plaintiff's Complaint. In fact, paragraph 7 of our Answer as individuals should read as follows:

"7. With regard to the allegations contained in Plaintiff's Complaint marked and numbered paragraph 22, Defendants ADMIT (except Defendant Baker who admits upon information and belief) that allegations contained therein, except that all Defendants DENY the last sentence of said paragraph."

/s/ John Acee
(John Acee)

/s/ Cynthia Barns
(Cynthia Barns)

/s/ John A. Nowak
(John A. Nowak)

/s/ James G. Plehn
(James G. Plehn)

/s/ Barbara Richards
(Barbara Richards)

/s/ Mickey Romeo
(Mickey Romeo)

Subscribed and sworn to before me

this 29th day of January, 1974.

/s/ Arthur F. Barns
ARTHUR F. BARNS
Notary Public, State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	CIVIL ACTION NO. 73-CV-562 REQUEST TO PRODUCE

Plaintiff, Francis C. Plano, hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendant F. Wright Johnson, produce and permit plaintiff or his attorneys to inspect and copy or reproduce each of the following documents:

1. Any and all written communications, whether formal or informal by or between defendant F. Wright Johnson and Mr. Stanley, a building principal in the Westmoreland Central School District, regarding plaintiff Francis C. Plano, made during the period of Plano's service with the Westmoreland Central School District.
2. Any any all written communications, whether formal or informal by or between defendants Clifford W. Baker and F. Wright

Johnson, concerning plaintiff Francis Plano, made during the course of Plano's employment with the Westmoreland Central School District.

3. Any and all copies of file memoranda, either formal or informal, made by or between defendants F. Wright Johnson and/or Clifford W. Baker, and/or by Mr. Stanley concerning plaintiff Francis C. Plano, made during plaintiff's period of employment with the Westmoreland Central School District.

4. A true copy of any and all reports or recommendations made by or between defendants F. Wright Johnson, Clifford W. Baker or building principal, Mr. Stanley, in support of defendant Johnson's recommendation to defendant Board that plaintiff Plano be terminated.

5. Any and all copies of formal complaints, letters, or other documents regarding "incidents" involving plaintiff and referred to in the Board's open letter of December 11, 1973.

6. Any and all copies of notes, memoranda or other recordings made of phone or other conversations regarding formal complaints or incidents involving plaintiff, and referred to in the Board's open letter of December 11, 1973, to include the names of the originator and receiver of such phone or other conversations.

It is requested that the aforesaid production of documents be made on the 7th day of March, at 11 o'clock in the forenoon, at the offices of Bernard F. Ashe, Esq., 80 Wolf Road, Albany, New York. Inspection will be

made by viewing and inspecting the required documents, recordings, notes, and/or memoranda and duplicating them.

/s/ Bernard F. Ashe
BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 -Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	CIVIL ACTION NO. 73-CV-562 REQUEST TO PRODUCE

Plaintiff, Francis C. Plano, hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendants Board of Education, Clifford W. Baker, F. Wright Johnson, Frank R. Melie, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romec, and Howard Walker produce and permit plaintiff or his attorneys to inspect and copy or reproduce each of the following documents:

1. The Minutes of the executive session of defendant Board of Education, held on October 30, 1973.
2. Any and all written communications, whether formal or informal by or between defendant Baker and a Mr. Stanley, a building principal in defendant Board's employ, regarding plaintiff

Francis C. Plano, made during the period of Plano's service with the Westmoreland Central School District.

3. Any and all written communications, whether formal or informal by or between defendant F. Wright Johnson and Mr. Stanley, regarding plaintiff Francis C. Plano, made during the period of Plano's service with the Westmoreland Cenral School District.

4. Any and all written communications, whether formal or informal by or between defendants Clifford W. Baker and F. Wright Johnson, concerning plaintiff Plano, made during the course of Plano's employment with the Westmoreland Central School District.

5. Any and all copies of file memoranda, either formal or informal, made by or between defendants F. Wright Johnson and/or Clifford W. Baker, and/or Mr. Stanley concerning plaintiff Francis C. Plano, made during plaintiff's period of employment with the Westmoreland Central School District.

6. A true and complete copy of the personnel file of plaintiff Plano, maintained by defendant Board of Education, its agents or employees.

7. A true copy of any and all reports or recommendations made by or between defendants F. Wright Johnson, Clifford W. Baker or building principal, Mr. Stanley, in support of defendant Johnson's recommendation to defendant Board that plaintiff Plano be terminated.

8. Copies of notes, memoranda or other recordings made of any communications between defendants Melie and Baker, giving

rise to the request (identified as Complaint Exhibit "D") to defendant Johnson for plaintiff's termination.

9. A true and complete copy of the minutes of defendant Board's meeting of November 2, 1973.

10. Any and all copies of formal complaints, letters, or other documents regarding "incidents" involving plaintiff and referred to in the Board's open letter of December 11, 1973.

11. Any and all copies of notes, memoranda, or other recordings made of phone or other conversations regarding formal complaints or incidents involving plaintiff, and referred to in the Board's open letter of December 11, 1973, to include names of the originator and receiver of such phone or other conversations.

It is requested that the aforesaid production of documents be made on the 7th day of March, at 11 o'clock in the forenoon, at the offices of Bernard F. Ashe, Esq., 80 Wolf Road, Albany, New York. Inspection will be made by viewing and inspecting the required documents, recordings, notes and/or memoranda and duplicating them.

/s/ Bernard F. Ashe
BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	CIVIL ACTION NO. 73-CV-562 REQUEST TO PRODUCE

Plaintiff, Francis C. Plano, hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendants Clifford W. Baker, Frank R. Melie, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo, and Howard Walker produce and permit plaintiff or his attorneys to inspect and copy or reproduce each of the following documents:

1. Copies of notes, memoranda or other records made of the executive session of defendant Board of Education held on October 30, 1973.
2. Any and all written communications, whether formal or informal by or between defendant Baker and a Mr. Stanley, a building

principal in defendant Board's employ, regarding plaintiff Francis C. Plano, made during the period of Plano's service with the Westmoreland Central School District.

3. Any and all written communications, whether formal or informal by or between defendant F. Wright Johnson and Mr. Stanley, regarding plaintiff Francis C. Plano, made during the period of Plano's service with the Westmoreland Central School District.

4. Any and all written communications, whether formal or informal by or between defendants Clifford W. Baker and F. Wright Johnson, concerning plaintiff Francis Plano, made during the course of Plano's employment with the Westmoreland Central School District.

5. Any and all copies of file memoranda, either formal or informal, made by or between defendants F. Wright Johnson and/or Clifford W. Baker, and/or Mr. Stanley concerning plaintiff Francis C. Plano, made during plaintiff's period of employment with the Westmoreland Central School District.

6. A true copy of any and all reports or recommendations made by or between defendants F. Wright Johnson, Clifford W. Baker or building principal, Mr. Stanley, in support of defendant Johnson's recommendation to defendant board that plaintiff Plano be terminated.

7. Copies of notes, memoranda or other recordings made of any communications had between defendants Melie and Baker giving rise to the request (identified as Exhibit "D") to defendant Johnson for plaintiff's termination.

8. Any and all copies of notes, memoranda or other recordings made of phone or other conversations regarding formal complaints or incidents involving plaintiff, and referred to in the Board's open letter of December 11, 1973, to include the names of the originator and receiver of such phone or other conversations.

It is requested that the aforesaid production of documents be made on the 7th day of March, at 11 o'clock in the forenoon, at the offices of Bernard F. Ashe, Esq., 80 Wolf Road, Albany, New York. Inspection will be made by viewing and inspecting the required documents, recordings, notes and/or memoranda and duplicating them.

/s/ Bernard F. Ashe
BERNARD F. ASHE
Attorney for Plaintiff
Office and P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- -

-FRANCIS C. PLANO Plaintiff -

-against-

-CLIFFORD W. BAKER, individually and as Supervising Principal of Westmoreland Central School District; F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties; FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District; JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the Board of Education of the Westmoreland Central School District, Westmoreland, New York -

Defendant. -

- -

73-CV-562

The following proceedings took place on the 21st day of January 1974, at the United States District Court, Federal Building, Albany, New York, before HONORABLE JAMES T. FOLEY, United States District Judge.

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ALBANY, N.Y.

A P P E A R A N C E S:

BERNARD F. ASHE, ESQ.
IVOR MOSKOWITZ, ESQ.
Attorneys for Plaintiff

MICHAEL P. DeSANTIS, ESQ.
Attorney for Defendants Baker, Melie, Acee, Barns Nowak, Plehn, Richards, Romeo & Walker

JOHN SCHOLL, ESQ.
Attorney for Defendant F. Wright Johnson

ARTHUR F. BARNES
Attorney for Defendants individually except F. Wright Johnson

THE CLERK: Francis C. Plano against Clifford W. Baker et al.

THE COURT: I am still not clear on the appearances. We have a list of appearances -- Mr. DeSantis, whom do you appear for?

MR. DeSANTIS: I appear for all the persons named in their official capacity and for the Board of Education.

THE COURT: That is, you appear for all the defendants in their official capacity, everyone of them?

MR. DeSANTIS: Yes, Except F. Wright Johnson for whom Mr. Scholl appears individually and in his official capacity.

THE COURT: Mr. School, you are his personal lawyer and also representing him in his

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official capacity?

MR. SCHOLL: That's right.

THE COURT: And then Mr. Barnes?

MR. BARNES: All defendants named individually, Your Honor, except F. Wright Johnson.

THE COURT: All right, Mr. Ashe.

MR. ASHE: Good morning, Your Honor.

THE COURT: You seem to like to come in Federal Court with all these school teachers.

MR. ASHE: Not all of them, Your Honor. We are here this morning --

THE COURT: Is there an aversion to the State Courts? I am very serious about it, because we seem to be getting more and more school teacher problems than this Court ever saw before.

MR. ASHE: I do not think there is an aversion to using the State Courts, Your Honor, I think the issues being raised are peculiarly in the first instance Federal issues and that is why the Court is beginning to get more and more of them.

THE COURT: That is debatable, because in my years, not only now as a Judge but previously they were always under Article 78 and remedies were obtained in school teachers problems. I

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don't know what your particular one is here, I haven't read your pleadings.

MR. ASHE: Well, Your Honor, the Federal Courts and the Federal statutes provide certain protection to citizens, and teachers are citizens, and I think they are entitled to --

THE COURT: I appreciate that.

MR. ASHE: -- recourse to the Federal Courts.

THE COURT: But you have your office here in Albany, don't you?

MR. ASHE: That's correct.

THE COURT: And of course you come in as a convenience for yourself, but we divide up our work in this District, Judge and -- Judge Port and myself, by an invisible of territory. You bring down cases here almost from -- one was Buffalo, as I remember it, you go right by Syracuse and Utica and come to Albany and that can't be tolerated.

MR. ASHE: It is not designed to increase Your Honor's work.

THE COURT: Westmoreland is around Utica? If you had a hearing you would have to have witnesses brought down to Albany. That is

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one of the reasons we aim at territorial convenience.

MR. ASHE: We are here this morning on a motion for a temporary restraining order and also for preliminary injunction. It was not contemplated by myself or counsel for the other side that we would necessarily have an evidentiary hearing this morning. This was the first motion day which it was possible to bring on the motion, and because of the nature of the case we felt that time was of more importance than waiting until the next motion term at Utica.

THE COURT: Well, if time is that urgent, then there is a sufficient reason. But ordinarily they belong in the particular place where they arise, motion wise and trial wise.

MR.ASHE: We understand that Your Honor.

THE COURT: Did you argue the Lackawanna School Board case yet?

MR. ASHE: Yes, it was argued on the 11th of January.

THE COURT: That came from Buffalo, Lackawanna.

MR. ASHE: It involved the Commissioner

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of Education, which is in Albany, and the Lackawanna State School District, so that I think the State admitted venue was proper in this District and there was no issue of that raised, Your Honor.

THE COURT: Who was on the panel in the Second Circuit?

MR. ASHE: Judge Kaufman, Judge Fineburg and Judge Smith.

THE COURT: All distinguished Judges.

All right, Mr. Ashe.

MR. ASHE: We are here this morning Your Honor on a motion for a temporary restraining order and for a preliminary injunction. Defendants have crossed moved with a motion to dismiss.

This is an action being brought pursuant to 42 USC 1983 wherein we are challenging the dismissal of a non-tenured teacher because the dismissal was on grounds which were Constitutionally impermissible.

I think in this Circuit it is clear, Your Honor, that these kinds of cases are cognizable in the Federal Courts, and there are two relatively recent cases --

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THE COURT: I think they are cognizable, but there is a feeling in the Court of Appeals, Second Circuit, against this continuous resort, and Judge Friendly wrote about it recently, coming in the Federal Courts when the State Courts are fully manned.

MR. ASHE: I understand that, Your Honor.

THE COURT: And have the same responsibility as the Federal Judges.

MR. ASHE: They don't always exercise it, Your Honor.

In both James and Russo you are dealing with a dismissal, summary in fashion, similar to that in the Instant case, and I think those two cases establish clearly that such cases are proper within the Federal Courts and have been properly dealt with by the Courts in the Second Circuit.

The facts giving rise to this case are as follows: The Plaintiff is a provisional English teacher. He was hired by the Westmoreland School District June 27, 1972 for a five year probationary period, that period to start on July 1, 1972. A copy of his appointment is attached to our complaint as Exhibit B.

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The Plaintiff taught in that school district from September '72 to December 7 of 1973. On September 25, 1973 the Plaintiff assigned as homework an essay on premarital sex. On the following day he was called in the Principal's Office where he had a conversation with the Principal, at which time the Principal expressed the view that he thought this was -- the assigning of this particular assignment was poor judgment on his part. He was also called that day into the office of the District Principal.

THE COURT: What grade was he teaching?

MR. ASHE: He was teaching 10th, 11th and 12th grades. Who it is alleged in the complaint advised him that he was through in this district and he would be asking the Board to fire him.

On September 27, which was the very next day, the defendant Baker and the defendant Melie signed a form which is attached to the complaint as Exhibit D, indicating that in the opinion of the Board of Education that the Plaintiff's services should be terminated, and requested the District Superintendent, defendant

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Johnson, to request his termination.

That form sought his termination effective as of November 1, 1973.

On October 2 the defendant Johnson forwarded such a request to the Board of Education.

Perhaps for Your Honor's understanding I might explain what happens in terms of the framework of the education law of the State of New York. A teacher is appointed on the recommendation of a Superintendent. Now in this particular instance this Superintendent has more than one school district which he services, and it is because of the nature of the particular school district that this Superintendent does service more than one school district. But in any event the Superintendent must recommend the appointment of a teacher to a Board of Education. The Board of Education then must by a majority vote approve the appointment of that teacher.

The same is true with the dismissal of a probationary teacher. The Superintendent must first recommend that dismissal before a Board of Education can dismiss.

And so on October 2, at the request of the Board of Education and the Supervising

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Principal, the District Superintendent requested the Board to dismiss the Plaintiff.

We are not contending in any respect that any of the statutory procedure for the dismissal of a teacher in the State of New York is violated. There is no question that they followed the mechanical procedural methods set forth in the statute for dismissing a probationary teacher.

In accordance with the statutory procedure the Plaintiff requested and was given reason for his termination. Those reasons are set forth in Exhibit G to the complaint -- I am sorry, Exhibit H to the complaint.

The District gave three reasons. These reasons were signed by the defendant Baker, who is the Supervising Principal, and the defendant F. Wright Johnson, who is the District Superintendent of Schools.

The reasons given: "You have been demanding of and uncooperative with the school administration; you have shown poor judgment in your choice of subjects for assignments in classroom discussion, and efforts on the part of school administrators to correct your

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deficiencies through discussion with you have been unsuccessful."

The Plaintiff contended these reasons were vague, and requested a full explanation of them and none was forthcoming, and the Plaintiff subsequently wrote a letter to the Board of Education, which was considered an open letter to the Board of Education, and in it he discussed the matters which he thought were giving rise to his discharge, which included his effort in behalf of the school newspaper, his objections as a professional in the district with respect to certain academic pursuits or practical problems as they existed within the school district and nevertheless the school district did on November 2 vote to discharge him by a majority vote.

Now apparently all of this was being done, Your Honor, without any prior kind of hearing being given to the Plaintiff.

On December 11, which was some months after the Board had voted the discharge the Plaintiff, the Board issued a public statement, and that public statement is attached as Exhibit M to the complaint, and in that public statement

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the Board indicated that the Supervising Principal and the High School Principal received a formal complaint regarding an assignment given to the students by the teacher. Upon investigation it was found that the complaint had merit. The High School Principal and the supervising Principal met with the teacher and the teacher was given full opportunity to justify his action.

And we do not contend, Your Honor, that the teacher did not meet with the District Principal and the Supervising Principal and did not explain why he had given the assignment, but we are saying that in and of itself it did not constitute the kind of hearing to which he was entitled.

The Exhibit goes on further and says that the Supervising Principal after reviewing with the High School the documentation of several other incidents involving the teacher in the 1972-73 school year, submitted an opinion to the District Superintendent that the services of the teacher should be terminated.

Now this was the first time that Plaintiff Plano was aware there were "several" "other incidents" which were going to be

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considered by the Board in connection with his summary discharge.

Additionally, Your Honor, one of the defendant Board members, the defendant Walker also issued a public statement. That is attached to our complaint as Exhibit L. And I think that his public statement is very revealing, I think it is also revealing, Your Honor, that in their answers to this proceeding, in the affidavits submitted in opposition to our position, no where is there an affirmative denial of the issuance of this public statement by the Board member Walker, nor is there any affidavit from the defendant Board member Walker, and I think that his public statement is very revealing.

With the Court's permission I would like to read it.

(Mr. Ashe read Mr. Walker's statement.)

I think that this kind of an expression, Your Honor, coming from a member of the Board who participated in the matters involving the discharge of this particular teacher raises the presumption that there were possibly Constitutional impermissible reasons considered by the Board in recommending its decision to terminate.

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THE COURT: Do they have a vote? I don't understand half of these things because we don't have enough of these cases. Does the Board of Education vote to discharge him?

MR. ASHE: Yes, by a majority vote.

THE COURT: How did Walker vote?

MR. ASHE: As best I am aware, he is one of the two who voted No.

THE COURT: Is there any record made of that?

MR. ASHE: In terms of the vote, of the precise vote, Your Honor, I am sure that there is a record. Whether there is a record as to how each member individually voted I am not sure. I have not had an opportunity to check those particular records, but I think the fact that he felt strongly enough about what was being considered to speak up in this fashion reflects that this Board of Education was considering conduct that perhaps they constitutionally were precluded from doing in connection with the discharge of a teacher.

I think that there are a number of cases which suggest if not in fact hold that the summary discharge of even a non-tenured

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teacher during the course of the school year imposes a stigma on that teacher. It says in essence that whatever conduct this teacher engaged in was so grevious that the Board of Education could not wait until the end of the school year to terminate this teacher's services, and under these circumstances I think that the cases are clear that prior to any kind of taking away of employment without a prior hearing is unconstitutional.

There is a leading case in the United States Supreme Court, Perry versus Sindermann which was decided --

THE COURT: I have read it several times.

MR. ASHE: In June of 1972, and I think this case makes it extremely clear that with respect to the behavior of governmental bodies that they must not deal with public employees, even when they are non-tenured, and may not necessarily have contractural rights to employment, in a summary fashion, in a summary fashion which would either materially affect their constitutional rights or abridge their constitutional rights.

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THE COURT: How long ago was his employment terminated?

MR. ASHE: His last day of work was December 7, Your Honor.

THE COURT: So what is the reason for a temporary restraining order?

MR. ASHE: The reason is, Your Honor, we do not believe that because a taking may be wrongful in the first instance, the fact it can be remedied by a damage award is adequate relief. This teacher at the present time has no employment, and what employment he had was summarily taken away from him. The nature of the taking is such that as a practical matter no other school district is going to touch him.

THE COURT: It may be, but this is January 21. Ordinarily the TRO's are looked for right after the conduct complained of.

MR. ASHE: Well, Your Honor --

THE COURT: Isn't that true? There is always an urgency in this, in the application for a TRO.

MR. ASHE: That's correct.

THE COURT: At least that is my experience.

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MR. ASHE: That is correct, Your Honor. This complaint, Your Honor, was filed on December 21, which was some three days before the Christmas holidays. School has not been in session I would say about half of the period of time in the interim since his discharge, so that the urgency is still there.

I would suggest, Your Honor, that in terms of the period of time between his discharge and the present time that there probably have been at most about 15, maybe 20 school days.

THE COURT: Outside of that, your temporary restraining order would seek for me to put him back in his employment?

MR. ASHE: That is correct.

THE COURT: Which is quite drastic.

MR. ASHE: I don't think so. I see it as being constitutionally required, if they are going to attack his right to free speech and to --

THE COURT: That may develop at a trial or a hearing, I am just going to focus my mind right now on your right to have a temporary restraining order, which is usually a mandate the way you are asking it, to tell the Board of

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Education to reverse their decision and hire this teacher.

MR. ASHE: I think, Your Honor, that a careful reading of the answer and of the affidavits in opposition to our motion will reflect that the material facts are not basically in dispute. There is an affidavit in opposition to the motion from the high school Principal, Mr. Stanley, who merely says that the fact that he required the lesson plans to be submitted to him in advance solely for two reasons, one, that he would have them available if he wanted to review a teacher's work, or two, if there was a substitute. He does not dispute the conversations had, that we allege took place between he and the Plaintiff. There is a general denial by all of the defendants of all of the material allegations of the complaint in the answer, but I think you can also look at the affidavits that they have filed in opposition to our motion.

THE COURT: Don't you agree it is a serious ruling for me to say to the Board of Education, right now, I mean in the beginning before I have even gotten a lot of the things in my mind, "Put this man back to work in

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Westmoreland"?

MR. ASHE: I think that is a serious ruling, Your Honor, and I think what they have done is very serious and requires that kind of direction.

THE COURT: We are not at the stage where it has been developed as to the seriousness.

MR.ASHE: I think when you reviewed --

THE COURT: You are the threshold stage now.

MR. ASHE: Yes, but if you review the affidavits in opposition to our motion, and I was trying to go through them simply, you will find that as I said Stanley does not dispute the fact that the conversations occured between he and the Plaintiff Plano. The defendant Baker does not have any reference in his affidavit to the conversations between he and the Plaintiff Plano. The affidavit of the Board members who gave affidavits, and I said that the Board member Walker has not given an affidavit, are all identical, basically identical with one of two variances. Some say that they received and considered the Plaintiff's open letter to the Board in their deliberations on November 2.

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Some say that the Exhibit D, they say that the legend as to the intent of the Board of Education and so forth is an error. The defendant Johnson says that the other defendants used the wrong form. Well, it would seem Your Honor that the defendants would be using the form that they normally use in such instances.

I would also suggest that where the District Principal is requesting the District Superintendent to recommend the discharge of a teacher, then it is not necessary for the Clerk of the Board, which is the defendant Melie, to participate in that request.

THE COURT: Was there any review here by the Commissioner or is it called for in this situation?

MR. ASHE: It is not necessarily called for.

THE COURT: Could you attempt it? I don't know.

MR. ASHE: The Plaintiff has a number of options, Your Honor, he could go to the Commissioner, he could go to Court, he could come into the Federal Court. We belive in this particular case we are raising purely a Federal

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constitutional issue, we are not raising any questions of state law which have to be decided by this Court. Under those circumstances I think this Court is better able to make those kind of judgments.

The discharge was summary. It was clearly, I think, as evidenced by the pleadings even at this stage precipitated by the fact that this teacher gave as a homework assignment in an English class the writing of an essay on premarital sex.

THE COURT: Is the basis of your complaint that it is his first Amendment rights that were violated?

MR. ASHE: Yes, both with respect to speech as a citizen, to his academic freedom as a classroom teacher.

THE COURT: And is there anything definite that says that that they discharged him because he had this topic of sex and so forth?

MR. ASHE: I think that the Board's public statement suggests that when they say in their public statement that --

THE COURT: The fact, Mr. Ashe, that

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it is suggested, doesn't prove it. As far as I am concerned as a Judge who listens to evidence and testimony, evidentary hearings are ordinarily called for in these type situations.

MR. ASHE: Does Your Honor have a copy of the complaint before you?

THE COURT: Well, the Clerk has it.

MR. ASHE: I would like the Court to look at Exhibit M. It says very clearly the Supervising Principal and the High School Principal received a formal complaint regarding the assignment given to the students by the teacher. The only assignment for which this teacher has had any commentary made to him by the school district was the assignment which he gave of writing an essay on premarital sex, and that is the only assignment that has been in any way alluded to by anyone in connection with this proceeding, and I think that a fair presumption would be that that was the assignment which precipitated his discharge. The request came two days after he gave the assignment. He had been observed and had in all other respects prior to that time been found to be a very satisfactory teacher, and I think that is what you might call

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a presumption which in the absence of being rebutted by affirmative evidence has to be presumed to be correct.

THE COURT: Well, we have to find out what these people thought about him, Supervising Principal, Baker. He set forth these three reasons. You don't believe it?

MR. ASHE: In the absence of any clear direction to this teacher that such subjects were taboo for teachers to utilize in their classroom teaching, I don't think this District can utilize that particular incident as the basis for discharging this teacher, and we have cases to support that position.

We have prepared, Your Honor, in connection with our motion both for temporary restraining order and for preliminary injunction a brief which we can submit to the Court which goes into detail with respect to the law in all of these areas, and we would be happy to provide it to the Court at this time.

THE COURT: All right, I will hear -- I don't know, Mr. Barnes, are you first or Mr. DeSantis?

MR. DeSANTIS: I guess I am first,

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Your Honor.

If it please the Court, I address myself first to you on this motion of the Plaintiff for temporary relief. He requests an order from this Court restraining the defendants from refusing to reinstate him, and in addition the second paragraph of his request in the motion for restraining order asks for further restraint for bidding the defendants from in any way interfering with his teacher's duties once he is reinstated as he requests. In other words, he doesn't want any restraint, any supervision, anything at all. This is a very broad request.

He cites as reasons his chance for probable success. He also states that irreparable injury has and will be done to him. He states that his constitutional rights have been violated, and he also states that his opportunity for future employment has in fact been deprived to him, and he further states that if he is reinstated no injury will occur or ensue to the defendant.

The law in this District appears to be well settled and clearly defines the heavy burden upon the party seeking the extraordinary

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remedy of preliminary injunctive relief. The moving party assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable harm or injury to him, or in the alternative that he has raised serious questions going to the merits, and that the balance of hardships tips sharply in his favor.

I would like to address these issues separately if I may. On the issue of probable success neither Plaintiff's complaint nor his affidavit and exhibits show that requisite of liklihood of success as required in this motion. There are no undisputed facts or allegations that establish that his right to free speech has been violated. There are no undisputed facts or allegations that establish that he has been denied due process. He in fact admits that the education law was followed faithfully.

There are no undisputed facts or allegations that he has suffered any irreparable injury or harm. In this regard, Your Honor, there is nothing in any of the statements of the defendant that in any way tend to define any moral wrong doing on the part of Plaintiff

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or in any way tend to inpunge his character.

The reasons given to the Plaintiff by the Board are in no way defamatory. Number one, you have been demanding of and uncooperative with the school administration; two, you have shown poor judgment in your choice of subjects for assignment and classroom discussion; three, efforts on the part of the school administration to correct your deficiencies through discussions with you have been unsuccessful. Nothing contained therein in any way inpunges character or reputation.

I am sure that many employees, Your Honor, both private; governmental are discharged regularly for similar reason.

On the issue of the irreparable injury or harm to the Plaintiff the motion must fail. The Plaintiff has in no way lost any license. He is still a professionally certified secondary English teacher which he was when he first came to Westmoreland. The Board action in no way affected his license and teaching certificate. He can apply elsewhere. Another employer certainly could give credence and take his application for employment. There is no

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restriction whatever in his making application for employment in any school anywhere in this State.

Mere non-retention by one employer, just what this is, hardly establishes the kind of foreclosure of opportunities amounting to a deprivation of liberty. There is nothing in any of the exhibits submitted by Plaintiff that in any way show any statement or fact that would in any way seriously damage his standing and associations in the community or foreclose his freedom.

THE COURT: Well Mr. Walker said, according to Mr. Ashe, he made some statement that he thinks gives great indication that his beliefs and so forth --

MR. DeSANTIS: Mr. Walker, Your Honor, in that exhibit he also is a school teacher, he happens to be a member of the Board.

THE COURT: Is that an elected school board?

MR. DE SANTIS: Yes. Mr. Walker is a school teacher and he certainly is free to express any thoughts or any idea that he wishes on this topic. I state that his statement

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in and of itself is conclusionary and does not in any way indicate that any freedoms of the Plaintiff were in any way violated. In fact the fact that the Plaintiff here had a person on that Board who was also a teacher certainly went to protect his due process and his rights.

THE COURT: When they make that decision to discharge, do they have a hearing? They don't have a hearing, but do they have any meetings whereby they take minutes or something?

MR. DE SANTIS: I am going to get into that in a minute, I will explain that entire process to you, and then if after I have concluded there are any questions that Your Honor would like to ask, I would be very happy to elaborate on that, but I feel as I go on I can explain that to your satisfaction.

Plaintiff's allegations and his affidavit concerning damage to his reputation and character and loss of opportunity of employment are conclusionary, general and not establised in any way. He makes no allegations in the moving papers as to what attempts he has made to seek employment, and how many applications he has filed and with whom, and certainly no factual

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basis or statements of facts have been presented that in any way indicates that any other employer or school has refused to hire him specifically because of the Board's action in termination of him.

On the question of the balance of hardships, the Court must consider whether the balance of hardships tipped so sharply in the favor of the Plaintiff as to warrant this preliminary relief. What is here involved is an evaluation of where the equities lie considering in addition to any hardships or even the mere allegations of same such factors as the uncertainty of the questions raised and the probable outcome of the dispute on the merits.

This also involves irreparable harm to Plaintiff which I have already discussed, which if you read all of these papers and everything you will see that no such thing has ensued.

Further as shown by the affidavit of the defendant Baker a sit down strike occured at the school and there was picketing, police had to be called and it was necessary to close school for a day in addition to some violence and possibly serious violence.

The affidavit of the members of the

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Board indicate the serious harm and disruption in the orderly educational process that might ensue if he were reinstated.

I refer to the facts set forth in the defendant Baker's affidavit more clearly as to the actual occurances that happened at the school.

This concludes my argument, Your Honor, on the motion for temporary relief. I have not touched on many other arguments in my motion addressed to you for the temporary relief because I am going to mention them on my cross motion to dismiss, because I feel that many of these other issues which I am about to broach are important and weigh heavily enough by themselves to merit specific mention therein on my motion to dismiss, and they tie in also the questions of the merits of the case and the outcome of the case.

THE COURT: Well, these things have to be taken in order, of course. The most important at this -- the most important thing at this stage is the temporary restraining order and preliminary injunction.

MR. DE SANTIS: Yes, Your Honor.

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THE COURT: The motion to dismiss ordinarily you can take some time with.

MR. DE SANTIS: It is not going to take me that much longer, and I feel I can tie in some of the other things.

THE COURT: Mr. Ashe seems to focus the action of the school board, the focus or the reasoning was done was on this premarital sex topic that this teacher assigned. How far outside of Utica is Westmoreland?

MR. DE SANTIS: It is about nine miles.

THE COURT: I didn't think it was that narrow a community, Utica or anyplace nearby. I don't know whether there is any policy whether you should teach premarital sex. There is a difference of opinion about that in all school districts.

MR. DE SANTIS: This again, Your Honor, is why I would like to --

THE COURT: I don't think you have to teach it, all you have to do is look at television and they learn a lot. But those are just asides. I think we get too serious about some of these propositions.

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MR. DE SANTIS: Probably.

Plaintiff alleges first, Your Honor, in his complaint, that terminating the probationer was done in violation of his rights of free speech. He cites the allegation that Mr. Ashe alluded to, allegation 16, the assignment of the composition. This is a conclusionary allegation in all respects, conclusionary because Plaintiff would have the Court believe that there is something about giving that assignment that standing by itself violates free speech, which it does not, and even more important there is nothing in any of the papers, exhibits or other proofs attached hereto taken in context with allegations sixteen, and give it the most favorable inference toward the Plaintiff in the tenor of his complaint, that would in any way lead to a finding that his rights under the first Amendment were violated.

Now the next contention is that his termination was effected without affording him due process under the 14th Amendment and in derogation of his rights under USC 1983. His contention here, Mr. Ashe alluded to it in his argument, was that he was not afforded a hearing

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before an impartial body and was not given an opportunity to be heard.

In this matter, Your Honor, the procedures outlined for termination of a probationary person are spelled out in sections 3013, 3019 and 3031 is new, having been added in 1972, and it provides that notice be given to a probationary teacher 30 days prior to a Board meeting at which a recommendation to terminate will be considered. In other words, the Plaintiff is a probationary teacher and is given a notice within 30 days that the Board will have a meeting at which this recommendation will be considered. Now 3031 also provides that the teacher may not later than within 20 days of said hearing request written reasons for termination. All of the above was followed, and on October 16, 1973 Plaintiff was furnished with a statement of reasons for his termination.

Now prior to that 3031 reasons need not have been given and no notice had to be given.

Now after the Plaintiff received the reasons, he had at least 10 days to prepare a response. Now the statute says you got this

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period of time to prepare any response you want, it just says the word "response" to the reasons we have given for the termination, and in this case he actually had seven more days because the Board allowed him to submit his statement the eve of the meeting. So no matter how you look at it it was at least ten days and probably seventeen.

Now at this point, keeping with the due process argument, the Plaintiff was afforded a complete opportunity to prepare any kind of response he desired without limitation, anything he wanted to send them. He could have sought legal help to prepare this response, could have prepared it himself. He could have prepared affidavits of witnesses in his behalf. He could have included affidavits from pupils, affidavits from teachers, affidavits from parents, affidavits from school officials, affidavits from experts in the field of education, anything he wanted, he could have submitted anything he wanted to the Board. He prepared two responses, one was a brief letter, Exhibit I, dated October 24, and his Exhibit J dated November 2, 1973.

Now it is significant to note here, Your Honor, if you go to his Exhibit I, in

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Exhibit I the Plaintiff himself does not request a formal hearing or a trial like hearing as learned counsel here has stated he is entitled, he didn't ask for that, he said he wanted a private hearing with the Board. I know of no law that authorizes such a hearing.

This response made by the Plaintiff is more in the nature of a request for a conference rather than a hearing or anything else.

It is also significant to note that in Plaintiff's Exhibit J Plaintiff responds specifically to each of the reasons for terminating his probationary appointment and he goes into detail by way of his own testimony on these issues in his Exhibit J.

Now even though this response Exhibit J was not filed with the Clerk as required within the seven days, the Board still accepted it, took it into account, read everything that was in there, gave it due consideration in coming to their decision.

Now on this Exhibit J again Plaintiff had the further opportunity to attach to this Exhibit any additional exhibits, documents, proofs, affidavits and the like as his response.

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It is significant to note also in connection with this, Your Honor, he recognizes what rights he had here because in his allegation 23 he uses the words "the Board did not give him an additional hearing." He wants another hearing. Now he chose to respond as he did, and as I have advised the Court there is no limitation whatever to him under that section 3031, he could respond in any way he desired.

In essence, Your Honor, due process protects the individual from arbitrary action. The Plaintiff was given a statement of reasons, he was given a sufficient and adequate opportunity to respond to them. He did respond to them. His response was carefully considered. Certainly insofar as a probationary appointment is concerned these sections of the Education Law afforded Plaintiff adeuqate and complete due process.

Now take it a step further -- take it a step even further beyond that, continuing with his contentions that he was not afforded due process, it must be realized that these statutes that have been followed in this case have set forth standards and procedures to be followed, and they were followed. In further keeping with

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due process it is also a safeguard to the Plaintiff and a legal fact that any decision of the Board of Education is not absolute and is not unreviewable. Section 310 of the Education Law provides review by the Commission, by the Board of Education. This was not taken or in any way done prior to bringing this Federal Action.

The Commissioner of Education, and I commend Mr. Ashe, he just successfully concluded one in the Remsen School District and we just received a decision on that in the case of Bonny Stacey.

THE COURT: That is Commissioner Nyquist, isn't it?

MR. DE SANTIS: Right, where the Board terminated her appointment. It was appealed to the Commissioner of Education and the Commissioner of Education reversed and reinstated her and cited New York Law in his decision in so reinstating. The Commissioner is bound by the case law and statutes of the State of New York and also by what is fair, rational and reasonable, and the decisions of the New York Courts have so indicated.

The Commissioner may review not only

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factually but also on the question on the merits and on the Constitutional questions.

If the Court please, in a case just recently decided by the Appelate Division, Third Department, Law Report News of November 30, 1973, it is in the Matter of Board of Education Central School District No. 1 --

THE COURT: What is the title of that?

MR. DE SANTIS: Matter of Board of Education, Central School District No. 1 Towns of Conklin, Binghamton, Kirkwood and Vestal, Broome County, it is against the State Division of Human Rights, they are the Appelants, this was decided by the Third Department on November 8, 1973. The Court there said "unfettered as this power of a Board of Education may appear, it is however circumscribed by the Equal Protection Clause of our State Constitution and subject to the provisions of the Human Rights Law." In other words, this case which is one of the more recent ones concerning the rights of a probationary teacher, and which is the law of the State of New York, the case law, in which the Commissioner is bound to follow any existing decisions, holds that Constitutional rights

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must be upheld, and if they are not the Courts of New York will correct.

It even goes further on, Your Honor, in other words not only do the teachers have this particular right but also it goes further and it states "further evidence of the absence of absoluteness of the power --" and they are referring to the power of a Board of Education -- "further evidence of the absence of absoluteness of this power to dismiss a probationary teacher although it is indeed very broad, is demonstrated in the realm of the public employment relations board." Now they can look at it and protect the rights of teachers -- "where it has been held has the authority to act upon an improper practice charge filed against a Board of Education" where in this case they said it was alleged the Board had dismissed five probationary teachers solely because of their activities on behalf of a teacher's association.

Now not only do we have the New York Courts recognizing the constitutional rights and priveleges and protections of teachers, but they are also protected if they consider this an improper practice under the Taylor Law to go and

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appeal this to the Public Employers Relations Board.

THE COURT: Are you going to leave a copy of that opinion?

MR. DE SANTIS: Yes, I will, Your Honor.

THE COURT: All right.

MR. DE SANTIS: There is the Westmoreland Teacher's Agreement which is an agreement between the teachers and supervising Principal and there are safeguards in here that the teacher has. In the Plaintiff's complaint is set forth a copy of the academic freedom paragraph, Article 30 of the Teacher's Agreement, which is very broad and which I feel certainly protects a teacher from any of the things that he is complaining of in this cause of action.

Now what does Article 30 mean and what does it mean in the context of the fact it is in an agreement between the teachers and the school? It means this, it means that any teacher feeling himself aggrieved if the school board violated any of the rights he has under this article can maintain a grievance under the teacher's agreement. Now this grievance, this

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action was also commenced. He has already started this. My papers referred to that. A grievance has been filed by this Plaintiff under the teacher's agreement. Now I believe that the grievance now is at step two. The way this grievance procedure works, the teacher or the association in his behalf presents a grievance to the Principal, it would be the High School Principal in this case. The grievance was presented in this case on behalf of the Plaintiff and they alluded to the paragraph on academic freedom. Now they asked for reinstatement of the Plaintiff and they also asked for punitive damages.

The request for relief signed by the President of the Association, the redress sought is that Mr. Plano be immediately reinstated and that he receive appropriate punitive damages. This was presented to the Principal. They then asked for a hearing from the Superintendent. The Superintendent had a hearing, the school Principal had a hearing and ruled against the Plaintiff or against the association on this redress, but there is still available to the Plaintiff the right to appeal this to the Board for a hearing, and he

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can get that any time he wants. Now the Board has to hear this redress. If the Board is in any way arbitrary, which it certainly won't be, but if it is he has the right to go to an arbitrator.

Now also in this agreement, and I believe I have set forth Provision 4 what it is, Paragraph 9 of the Greivance Procedure under the Agreement which the School Board is bound by, the teacher represented by the Association may appeal a determination of the supervising Principal to the Board of Education and request a hearing of the Board of Education. He hasn't done that yet and there is no time limit within which he can now go to the Board for a hearing, he can ask for a hearing at any time based upon this grievance that was submitted in his behalf by the Association.

It goes on further to state that any hearing may be conducted by one or more members of the Board provided that if less than the full Board presides at such hearing the member or members conducting such hearing shall render a report thereon to the full Board of Education, and the full Board shall then make its report.

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The teacher and the Association may appear at the hearing and present oral or written statements or arguments. Then it states that the Board shall report its findings and so forth.

Then in Paragraph 12 if the decision of the Board of Education on this redress he is asking under the teacher's agreement, which is my Exhibit 2, if the decision of the Board of Education is not satisfactory to both the aggrevied party and the Association, the Association may request in writing within ten days -- ten school days after such decision that the grievance be submitted to arbitration. That is another remedy that he still has.

Even if under the reading of this agreement with no time limit to appeal to the Board of Education, even if after this Federal case were concluded and resolved not in favor of the Plaintiff, he could still appeal to the Board on his motion for redress.

Now I state, Your Honor, in conclusion, this goes to the issue of due process, it goes to the issue of hearing and it is also important to my motion to dismiss on the ground that available remedies were not taken. There

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were many remedies, State and administrative remedies available to the Plaintiff, none of them were taken. There is still one pending. Thank you, Your Honor.

THE COURT: All right, Mr. Barnes.

MR. BARNES: If the Court please --

THE COURT: Mr. Ashe, did you file your original brief with the Clerk?

MR. ASHE: That is the original, Your Honor. Would the Court like another copy?

THE COURT: I don't know. Do you have enough copies for your adversaries?

MR.ASHE: Yes.

THE COURT: Yes, I would like to have a copy to work with.

MR. BARNES: If the Court please, I would of course first like to join in Mr. DeSantis' argument on behalf of these individual defendants, I am submitting a memorandum in which I have set forth the substantive law of the State of New York regarding the corporate nature of the Board's actions and why we feel that this was a Board action, that they made the decision to discharge, dismiss the teacher, and that therefore as individuals neither the supervising Principal,

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the Board Clerk nor the Board members as individuals should remain as proper parties in this action.

As to the 42 United States Code 1983 and jurisdiction under 28, 1343, those do of course speak of persons, they speak of Constitutional rights being abridged. It seems to me that a clear reading of the papers shows no abridgment of his freedom of speech unless he says it is absolutely unfettered.

In regard to due process I would only like to elaborate just a minute on Mr. DeSantis' argument. It was as he said prior to his dismissal, the substantive of the State of New York, that reasons did not have to be given in the dismissal of a non-tenured or probationary teacher. That law of course set forth, as Mr. DeSantis said, the procedure now to be followed, 30 days notice to the teacher for his right to ask reasons and to give written answers to those or written reply to those reasons. I think it is without question, Your Honor, settled that there is a difference between a tenured Governmental position and a probationary governmental position. It is implicit in every way.

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Section 3020A of the Education Law of the State of New York sets forth the procedures for the dismissal of a tenured teacher in this state. It starts out: "Filing of charges. All charges against the person enjoying the benefits of tenure shall be in writing and filed with the Clerk. A written statement specifying the charges in detail" and so forth. This is the language of that statute and it sets up of course a very specific method of a full trial type hearing. And yet we are talking about a probationary teacher and the fair dismissal law we are talking about wherein reasons shall be given and wherein replies may be made. I submit, Your Honor, that there has got to be a difference between the dismissal of a tenured teacher and a probationary teacher, that it is recognized by the Legislature of the State of New York, and in fact to hold in each instance such as this one that you have a full trial type hearing, cross examination, pre-trial discovery and all the things that that implies, it would absolutely abolish the distinction between tenured and probation.

I would like to refer to only one

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case, Canty against Board of Education, Second Circuit, 1972, 470F(2d)1111. In that case the petitioner was a substitute teacher in New York City, and in New York City as the case states a substitute teacher is a probationary as opposed to a tenured teacher. In that case the petitioner after his dismissal retained his teaching license. In that case the reasons given reflected on petitioner's conduct as a teacher. I submit that thus far we are closely on all fours with this situation. There was one difference, under the New York State procedure the petitioner could present witnesses. Under our procedure here in upstate New York it is written reasons and written replies, but it went no further than his appearing and presenting witnesses in his own behalf. And it was held in that case that the teacher is not entitled to a full trial type hearing. If such discharges were reviewable in the Federal Court on the basis of mere contentions that these dismissals lack due process, the discretion vested in the school authorities would be meaningless.

One more comment, Your Honor, and that is implicit in this Canty case that I am

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talking about is the finding that a discharge as opposed to a non-renewal, a discharge in mid-year for reasons "reflecting on conduct as a teacher" does not create a right to a full trial type hearing.

I ask for the dismissal of the complaint as against the individual defendants and I join in Mr. DeSantis' motion.

THE COURT: All right. Mr. Scholl?

MR. SCHOLL: May it please the Court, Your Honor, F. Wright Johnson is the District Superintendent of Schools for Oneida District 109 of Madison and Herkimer Counties. Now as such he is an employee of the State of New York, and that is admitted in paragraph five of the Plaintiff's complaint. The thought occured to me that the State of New York might perhaps be a necessary party to this action in view of the fact that its employee is a party, and I do submit to Your Honor that the State of New York should be and is a necessary and proper party to this action.

Now as District Superintendent of Schools, Your Honor, Mr. Johnson pursuant to Section 3031 of the Education Law has the power,

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the duty to make recommendations and I underscore the word recommendation, to the various schools within his district with respect to the termination of probationary teachers. The law requires he make the recommendation to the School Board. The ultimate decision lies with the School Board. He has nothing to do with the matter once he makes a recommendation.

Now as stated in his answering affidavit there are nine school districts -- actually there are more than that, but nine that he actually oversees within his school district, supervising district, with perhaps some 800 or 900 teachers. He has devised procedures for the school principals or school superintendents to come to him and advise him that they would like to recommend to him that a certain teacher be terminated. It is impossible for one man to know all of the teachers in all of these districts, so he does rely upon the superintendents or the principal of each and every school for a recommendation. The recommendation from the school principal to him to taken into consideration by him. He discusses the matter with the school principal, and based upon

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his investigation of the matter he either recommends to the school board that the teacher be terminated or he doesn't recommend it, it is that simple.

Now I note that the Plaintiff has very conveniently made Mr. Johnson an agent of the Board of Education of the Western Alliance School for the purposes of this action, and that is in paragraph 5 of the complaint. That is nothing more than a conclusion upon the Plaintiff's part and in no way is Mr. Johnson an agent of the Board of Education. He is as stated and admitted an employee of the Commissioner of Education of the State of New York.

In this particular case Mr. Johnson received a telephone call from Mr. Baker, the Principal at Westmoreland Central School, indicating that he wanted to discuss the termination of a teacher. Conference was held on the telephone and then a personal conference was held. As a result of those conferences Mr. Plano - the recommendation was made for the termination of Mr. Plano to the school board.

In the motion for a temporary restraining order and preliminary injunction the Plaintiff

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of course seeks affirmative action by this Court. It is my understanding, Your Honor, that this Court should have the authority or the jurisdiction or the power if it is going to issue such an order to cause someone to do something within the framework of that order, and I submit to you that Mr. Johnson if Your Honor grants the relief requested by the Plaintiff can in no way do anything to reinstate Mr. Piano, he has no power with regard to reinstatement of teachers, his power is simply the termination of probationary teachers. That he did, and by no stretch of the imagination can that action be said to abridge the constitutional rights of this Plaintiff.

I submit to Your Honor, and this may be extreme, but I submit that it is possible that he could recommend the termination of a teacher in pure violation of his constitutional rights and at that stage this Plaintiff would have no action against Mr. Johnson. He could recommend the termination, "I want to violate his constitutional rights," but unless the school board acts affirmatively on his recommendation the teacher still remains employed. He may have an action for

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libel if he wants to bring one or something of that nature but he has no action under the Constitution of the United States.

Further, Your Honor, this action is brought against Mr. Johnson individually. I submit to you that all throughout the papers of the Plaintiff they admit that he is acting as an employee of the State of New York and as District Superintendent and not acting individually.

I submit the complaint should be dismissed against him individually. I further would like to point out to the Court that Mr. Johnson is in no way required to give anyone a hearing regarding his recommendations. The Plaintiff indicates in his moving papers that a request was made to the school board for a hearing, but no where does he indicate that he made any request to the District Superintendent for a hearing.

Now whether or not the District Superintendent grants him the right to a hearing is another matter. The law says that he does not have to, and as a matter of fact the law is cloudy as to who has to respond to Mr. Plano's or the Plaintiff's request for reasons for

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termination. When you read the statute it appears as though since the District Superintendent made the recommendation we suppose that he is the man to supply the reasons, and because of the uncertainty of the language in that statute Mr. Johnson signed the letter setting forth the reasons, as Mr. Baker also signed it.

There is great deal of confusion on that statute as to just who is to supply the reasons, but I think since both parties signed the letter due process was followed.

Much has been said this morning, Your Honor, about a public statement by a Board official member acting as an individual. I submit to you, Your Honor, that his statement is nothing more than an individual statement and is in no way binding upon the Board of Education of Westmoreland Central School. That Corporation, Board, acted as a corporate body when it dealt with this matter and voted by a majority of five to two to terminate him.

Mr. Walker desired to put something in the newspaper, and any citizen who wants to do so can do that. I submit it is not binding on this Court, it is simply an opinion expressed

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by an individual.

There is no way, Your Honor, that I can see that Mr. Johnson is involved in this law suit. I don't want to belabor the point, Your Honor, but he is merely acting as a District Superintendent and making recommendations which have no force and effect unless they are acted on by the Board of Education affirmatively.

I also would like to submit to Your Honor that the State of New York should be a party to this, and further with respect to the motion for a preliminary injunction and temporary restraining order, that affidavits have been presented by all defendants indicating the effect that such action by this Court will have upon the educational process at Westmoreland Central School, and all of the affidavits, and there are none I might add from our opposition addressing themselves to that point, all of our affidavits indicate that there will be a tremendous effect upon the educational processes if this man is permitted to go back to work prior to any complete hearing on the issues, which I might add are in dispute, contrary to what Mr. Ashe has stated, all of the issues in this complaint are

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disputed.

Thank you, Your Honor.

THE COURT: Have all the defendants filed opposition affidavits?

MR. SHOLL: Affidavits, Your Honor, but not memorandums of law.

THE COURT: Have you filed any?

MR. SHOLL: No, I have not.

MR. BARNES: We are about to, Your Honor.

MR. DE SANTIS: Mr. Ashe has presented to us a lengthy affidavit or memorandum, Your Honor. I wonder if Your Honor would be kind enough to afford us some additional time. I have prepared a memorandum and I would like some time to submit an additional memorandum.

MR. SHOLL: I would join that request.

MR. BARNES: And I.

THE COURT: How do you feel about that, Mr. Ashe? I assume you gave it to him this morning?

MR. ASHE: I have no objections to their having time to reply, Your Honor, as long as I have an opportunity thereafter to reply to whatever they may submit.

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THE COURT: How much time are we talking about? Usually these TRO's move along quickly. I usually have to decide them in ten minutes or something. It is up to you people if you think you do need time. You do have a substantial memorandum that you have given me, it seems to be confined to the TRO and preliminary injunction.

MR. ASHE: It is addressed to both, Your Honor.

Your Honor, may I have an opportunity to rebut?

THE COURT: First I want to get your time period on there answering memorandum, how much time do you want, Mr. DeSantis?

MR. DE SANTIS: May I have two weeks, Your Honor?

THE COURT: So you are now handing, Mr. Barnes, a brief for whom?

MR. BARNES: These, Your Honor, are memorandums of Mr. DeSantis in opposition to the motion for a temporary injunction for Mr. DeSantis and myself to dismiss, and on behalf of myself for the individual defendants.

MR. AHSE: In view of the briefs

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that I am being handed I would have to change my position. I would take it, Your Honor, that the defendants have had the same opportunity I did to present a brief with respect to these matters, the basic issues which were discussed today, I would presume that the issues they are raising are adequately dealt with in these briefs, and what we would be considering in this point in time was the question of my reply briefs, not briefs in the first instance.

MR. SHOLL: Your Honor, I have not submitted a brief at this stage, and the reason being I came into this case later than my co-counsel. I have been lead to believe or was lead to believe for quite some time after the papers were served that the State of New York would be defending here, and I have communications to that effect, and then I was notified at a late date they would not be defending. Therefore I had to step in and get and get papers out and I did not have an opportunity to prepare a brief, and I would like that opportunity.

THE COURT: Well, Mr. Barnes, I am not clear on your memorandum. You have one

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you gave me here?

MR. BARNES: Yes, sir.

THE COURT: That is in behalf of the individual defendants?

MR. BARNES: Yes, sir.

THE COURT: And then we have with the same backer of your firm and Michael DeSantis' name appears on it.

MR. BARNES: We are joining in that memorandum, Your Honor, to dismiss the complaint.

THE COURT: So your first memorandum is on the temporary restraining order and the preliminary injunction?

MR. BARNES: Yes, sir.

THE COURT: And your second one is on the motion to dismiss the complaint which was filed by whom?

MR. BARNES: I am filing them now.

THE COURT: Did allthe defendants file motions to dismiss?

MR. BARNES: Yes.

THE COURT: And Mr. DeSantis then has his own memorandum?

MR. DE SANTIS: That's correct.

THE COURT: On the motion to dismiss?

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MR. DE SANTIS: Yes, Your Honor.

THE COURT: You also have one in which you join with Mr. Barnes?

MR. DE SANTIS: That's correct.

THE COURT: And, Mr. Ashe, are you just receiving these now?

MR. ASHE: Yes, I am, Your Honor, just as they had just received mine, and I would submit, Your Honor, that what the parties have done is provided with -- provided you with briefs on the merits, and what we are discussing at this point is really reply briefs to the briefs the Court has in its possession, and under those circumstances I don't think two weeks would be necessary.

THE COURT: You want to reply to their briefs, don't you?

MR. ASHE: Yes, I do. I would presume I do. I haven't read them.

THE COURT: At least there is three of them. Mr. Scholl, are you going to file a memorandum?

MR. SCHOLL: Yes.

THE COURT: How much time do you want?

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MR. SCHOLL: Well, I will stick with my co-counsel and ask for two weeks, Your Honor.

THE COURT: Why don't we have all the briefs in in two weeks, including Mr. Ashe's reply to theirs. I mean we seem to be getting mixed up on so many briefs.

MR.ASHE: I think two weeks is an undue length of time, Your Honor, in view of the fact that the Court does have basically the parties briefs have -- that have now been handed to the Court. What we are talking about are replies to those briefs by the specific parties and I don't think two weeks is required for that, I don't think two weeks is required to answer those briefs at this point in time. The parties may decide not to file any replies to those briefs, there is that possibility. I don't know, Your Honor, I haven't read their briefs.

THE COURT: Well, what do you recommend?

MR. ASHE: I would recommend a week at the most.

THE COURT: I will make it ten days, that is, ten days for everybody whether they are reply or original briefs. Mr. Scholl's will be a new brief so I don't know how you want to treat

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that, I think it will be in the form of a reply anyway, but ten days for all further briefing and replies for the temporary restraining order, temporary injunction and also the motion to dismiss the complaint which is quite substantial in the sense that ordinarily it doesn't have to be done as quickly as your motion for the temporary restraining order or preliminary injunction.

File original briefs with the Clerk and send me copies here in Albany of your briefs, and, Mr. Ashe, I wanted to ask you, because I am interested, what about exhaustion of administrative remedy? The Second Circuit still hasn't given up Eisen against Eastman.

MR. ASHE: We have discussed that in our brief. It is our view it has been overruled by subsequent decisions of the Supreme Court.

THE COURT: I believe the Second Circuit a couple of weeks ago reaffirmed, and I think Justice Marshall in the Supreme Court pointed up the fact that he disagreed with the majority ruling on the exhaustion, at least I think there is still something that is undecided in that aspect of it.

MR. ASHE: Well, I think, Your Honor,

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that Russo and James also go to that issue, and those cases are discussed in our brief.

I would, Your Honor, like the Court's permission, to have a brief rebuttal to the arguments made by the other parties, if I may.

I think that I have to agree with Mr. Scholl that the statute is not clear. I am speaking of Section 3031, as to who is required to give the reasons. In this particular case the District Superintendent and the Supervising Principal gave the reasons to the Plaintiff in response to his request pursuant to that statute. The Board did not give any reasons, or there was no way of discerning the Board's reasons until they issued their public statement.

THE COURT: Has it been decided in the New York State Courts as to who should give the reasons? It seem to be first with them.

MR. ASHE: I don't think the issue has been raised.

THE COURT: Has that statute been construed?

MR. ASHE: I don't know offhand whether it has or not, Your Honor, but I don't recall that that issue -- I do not recall that

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issue being raised in any Court proceeding.

You had raised the question with respect to minutes, with respect to the meeting of November 2 the meeting entailed nothing more than a motion to dismiss the Plaintiff and a vote. There was no discussion of any kind. If I remember correctly I think the meeting lasted somewhere in the neighborhood of seven minutes, so it was a very short meeting.

I think that the Board in its public statement reflects that it discussed the issue in executive session. Now there are to the best of my knowledge no minutes kept of what goes on in an executive session, so that we have no bases here for discerning with precision what matters were in fact considered by the Board in connection with their consideration of Mr. Plano's discharge.

With respect to Mr. DeSantis' reference to sit down strikes, it is my understanding that there was some disturbance in the school district on December 7, which was the last date Mr. Plano actually performed any services. The circumstances surrounding that disturbance I am not familiar with. I am familiar with the fact

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that they did have some relationship to Mr. Plano's discharge. Precisely what, I am not sure. It is my understanding the -- Mr. Plano was not involved in those disturbances.

Much is made of the fact that no law authorities -- excuse me, no law authorizes a Board to provide a hearing, there is no law that prohibits the Board from having a hearing and I think that point should also be made to the Court.

We have not challenged the distinction between a tenured and probationary teacher, we are simply saying, Your Honor, that the Courts of this country and expressly the --

THE COURT: At least whether it is tenured or non-tenured you can't violate constitutional rights.

MR. ASHE: That is correct, Your Honor, and that tenure and non-tenure has no bearing on the case raising the question of the constitutionality of the discharge.

With respect to the State of New York being a necessary party, we do not believe that it is. The act of a "district superintendent" in the context Mr. Johnson functions is a

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convenience created by the Legislature to provide to those districts who do not emply their own District Superintendent a chance to comply with the statutory requirements, and I submit that to the extent that this Superintendent is acting with relationship to matters pertaining to this particular school district that he is acting as a District Superintendent like any other District Superintendent, and that for those purposes he is the agent for that particular school district.

THE COURT: In several of the school teacher cases they did bring in the Attorney General and the Commissioner.

MR. ASHE: That comes in two situations, either where action of the Commissioner himself is being attacked or the Constitutionality of a statute is being raised and the Attorney General has to be brought in as a party, and we are not doing that here.

I think that when you view the statutory scheme and in the logical format that teachers when they are hired in this State are hired for a probationary term, and it is expected on the part of teachers and on the part of the employers that that teacher will serve their

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probationary term and either get tenure or be dismissed at the end of the probationary term, but I think it can be generally accepted that a teacher is not generally dismissed during the probationary term except for some grievious reason, and I think this type of pattern was referred to when the Court used the language and said that a written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient cause is shown.

THE COURT: These cases are serious and delicate and sensitive, no question about it, at least that is my inclination when I have this type problem. I know there is always a fear, and it has been argued to me once they get this discharge that they are harmed in getting other employment. I had one instance where the teacher that was discharged in this same type of grievance went on to a better position in another school district.

MR. AHE: Unfortunately that hasn't been the case here.

THE COURT: That was just one I know

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of, maybe it doesn't work out in all instances.

MR. ASHE: We are prepared to submit to the Court affidavits showing that this individual has sought employment and that his discharge has affected his ability to obtain employment.

I would just like to make one final observation, and I have to go back to Mr. Walker. I think it is very significant that in this proceeding up to this point none of the papers that are filed by any of the defendants contain any affidavits from Mr. Walker, nor do they contain any express denial of the allegations of our complaint by Mr. Walker. It is a general denial by all defendants of all of the allegations, but Mr. Walker has not filed any affidavit in this proceeding and I think that is significant, and I think that that adds some credance to his public statement as expressed in our exhibits.

THE COURT: All right, I think I have been here long enough and heard enough argument on it because these are problems that need research, and of course it is a state of flux in some aspects. I will reserve decision and you have ten days to file all the briefs.

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This is to certify that the foregoing is a true and accurate transcript of the proceedings heard at the date and time noted in the heading hereof.

Martin L. Miller

MARTIN L. MILLER
Official Reporter
United States District Court
Northern District of New York

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK B. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT Westmoreland, New York,

73-CV-562

Defendants.

APPEARANCES:

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JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiff was employed as a probationary English teacher in Westmoreland Central School District from September 1972 to December 7, 1973, when the school board effected the termination of his employment. The reasons for his termination are the central question of this lawsuit, although a jurisdictional problem prevents this Court from pursuing these reasons at this time. If must suffice for present purposes to note that plaintiff and defendants agree on very little and thus this controversy is in very large part a factual one. Plaintiff alleges that he was led to believe by responsible persons that sexual problems among teenagers, including teenage incidence of veneral disease and teenage pregnancies, were becoming serious problems in high schools. Moreover, he attended seminars conducted by county organizations to better understand these problems.

On September 24, 1973, plaintiff submitted a lesson plan to his principal which included a homework assignment for his English class on the subject of "premarital sex." From this point on the facts are greatly disputed, but plaintiff alleges that this particular assignment displeased some parents, his principal and, ultimately, the school board, resulting in the termination of his employment. There were ensuing incidents between plaintiff and the school board which included a request by plaintiff

pursuant to the New York Education Law § 3031 (McKinney's Consolidated Laws, Supp.) for a statement of the reasons for his termination and a response by plaintiff thereto. The statement of reasons for the termination given by the school board were that plaintiff was "demanding of and uncooperative with the school administration . . . show[ing] poor judgment in . . . subject for assignment and classroom discussion . . . [and] efforts to correct [plaintiff's] deficiencies have been unsuccessful." Plaintiff alleges that the board also took into consideration a rumor that he was dating a ninth grade girl, thereby tacitly impugning his reputation in addition to terminating his employment.

As the cases cited in this decision will indicate, the facts of this case, unsettled as they are at this point, raise many issues of constitutional law. The status and rights of a non-tenured or probationary teacher have been the subject of two recent Supreme Court decision [Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972)], as well as the cases cited infra. A trial on these issues if held must carefully develop the facts because they are critical in striking the delicate balance between the school board's right to supervise its schools and the teacher's right to free speech, academic freedom and due process of law. Again, the facts of this case are quite unsettled in critical areas and their importance in resloving this dipute cannot be overemphasized.

But now I must turn to the narrow question of jurisdiction in this case. Plaintiff brings this action pursuant to Title 42 U.S.C. § 1983 and Title 28 U.S.C. §§ 1331 and 1343(3) alleging that he was dismissed from his position as an English teacher in the Westmoreland Central School District, Westmoreland, New York, in violation of his rights under the United States

Constitution. His complaint was filed with this Court on December 21, 1973 and on January 14, 1974, plaintiff, by his counsel, filed a motion for a temporary restraining order and a preliminary injunction which his counsel in accord with the rules of this District Court noticed for return and hearing on January 21, 1974. This motion seeks to enjoin defendants from taking any action terminating plaintiff's position and an express mandatory direction reinstating him as an English teacher. The defendants in three separate motions move to dismiss the complaint on the specific grounds (1) the complaint "fails to state a cause of action against Defendants upon which relief can be granted" and (2) "Plaintiff has failed to exhaust his administrative and other remedies."

It is my judgment that under the circumstances of this case a speedy and effective administrative remedy was and is potentially available to plaintiff pursuant to Section 310 of the New York Education Law (McKinney's Consolidated Laws) allowing the appeal of his termination to the Commissioner of Education. Since plaintiff has not availed himself of this remedy, it is my judgment that this Court has no jurisdiction to entertain the suit under 42 U.S.C. § 1983 or 28 U.S.C. §§ 1331 and 1343(3). Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969), cert. den. 400 U.S. 841 (1970).

In recent years, the necessity for exhausting administrative remedies has been limited by a number of Supreme Court decision. See McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); King v. Smith, 392 U.S. 309, 312 n. 4 (1968); Houghton v. Shafer, 392 U.S. 639 (1968). The major thrust of these exceptions has been interpreted by the Court of Appeals, Second Circuit, "as simply condemning a wooden application of the exhaustion doctrine in cases under the

Civil Rights Act." Eisen v. Eastman, supra, 421 F. 2d at 567-69. In McNeese v. Board of Education, supra, 373 U.S. at 674, the statement "it is by no means clear that Illinois law provides petitioner with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of federal rights" seems subject to the logical extrapolation that if an administrative remedy is sufficient and adequate in providing a remedy such a factor is important to consider in determining federal jurisdiction. However, there still remained a question whether, for practical purposes, these exceptions have not swallowed the exhaustion rule thus effectively eliminating it as a factor in civil rights claims. In Gibson v. Berryhill, 411 U.S. 564 (1973), the Supreme Court has again pronounced the exhaustion requirement alive and well in federal law. This reaffirmation in Gibson was rather oblique at best because while the Court refused to say exhaustion is no longer a prerequisite for jurisdiction, it also refused to require its application under the facts of Gibson. Nevertheless, the Court of Appeals, Second Circuit, has taken the occasion of Gibson to reaffirm its own leading case on this issue, Eisen v. Eastman, supra, by saying: "We therefore see no occasion to retreat from this portion of Eisen . . ." Blanton v. State University of New York at Geneseo, _____F. 2d _____, _____, Dk. Nos. 73-(1088, 1259), Slip Op. 347, 359 (2d Cir. Nov. 19, 1973). The Supreme Court has provided a very recent allusion to the existence of an administrative exhaustion requirement in Christian v. New York State Dept. of Labor, 42 U.S.L.W. 4181 (January 21, 1974). The Court therein discussed the merit of seeking prior administrative review before a federal court addresses the claims, such as the economy and efficiency of federal court addresses the claims, such as the economy and efficiency

of federal courts, integrity of the administrative agency and the use of their expertise, and possible resolution or simplification of the controversy. Id., 42 U.S.L.W. 4183; see also United States ex rel. Marrero v. Warden, Lewisburg, Pen., 483 F. 2d 656, 659 (3rd Cir. 1973); Negron v. Wallace, 436 F. 2d 1139 n. 1 (2d Cir. 1971); Dunham v. Crosby, 435 F. 2d 1177, 1181 n. 2 (1st Cir. 1970); Hall v. Garson, 430 F. 2d 430, 436 n. 6 (5th Cir., 1970).

Thus, while there is no question that there is a requirement to exhaust administrative remedies, the question remains whether it applies to the instant set of facts. Based on two recent cases in the Court of Appeals, Second Circuit [Goetz v. Ansell, 477 F. 1042 (1972)], in my judgment plaintiff has failed to exhaust a viable and adequate administrative remedy which therefore deprives this Court of jurisdiction in this Section 1983 action. Eisen v. Eastman, supra.

James and Goetz involved the New York State public school system and the particular administrative procedure embodied in § 310 of the New York Education Law (McKinney's Consolidated Laws) which allows decisions of local school boards and officials to be reviewed by the Commissioner of Education who may reinstate a teacher. These cases prove helpful when they are compared because § 310 was pursued in James and ignored in Goetz, yet the different approaches by the plaintiffs were approved by the Court of Appeals, Second Circuit.

In James an appeal was taken to the Commissioner of Education (Id., at 569-70) prior to the Section 1983 suit. The Court of Appeals approved this procedure and emphasized it would cost plaintiff nothing in terms of his remaining right to pursue judicial remedies in the forum of his choice:

> It is still the law in this Circuit, however, that a Civil Rights plaintiff must exhaust administrative remedies. Eisen v. Eastman, 421 F. 2d 560 (2d. Cir. 1969), cert. denied 400 U.S. 841 (1970). It hardly can be suggested that a plaintiff having followed the course laid out by Eisen, was to be barred henceforth from pressing his claims to final judicial review or to be deprived of his opportunities to litigate his constitutional claims in the judicial forum of his choice. Id., at 570-71.

Goetz, as James and the instant case, involved First Amendment claims but, in my judgment, because of the precise nature of the claim, and the undisputed facts therein, the Court of Appeals held that no administrative procedure gave a realistic chance to remedy the complaint and concluded that a § 310 appeal was "certainly or probably futile" withing the meaning of Eisen. Goetz v. Ansell, supra, 477 F. 2d at 637 and n. 1. The uniqueness of the claim in Goetz, unlike James or the case at bar, revolved around a student's refusal to say the pledge of allegiance. The critical factual difference there is that the Commissioner of Education not only had promulgated regulations on the conduct in dispute, being then under legal obligation to apply such as stated, but also had very recently heard appeals on the claim and rejected them.

It thus appears that § 310 of the N.Y. Education Law is a proper and available administrative remedy to exhaust before jurisdiction may be exercised pursuant to § 1983, unless there is sufficient indication presented by the plaintiff that due to administrative barriers or previous decision or actions, it would be unlikely that relief could be obtained on at least some of the merits of the claim.

There is little merit in the numerous arguments presented in behalf of plaintiff to avoid § 310; most of them to my mind are dealt with in the citations contained herein. However, one particular case cited by

plaintiff [Russo v. Central Sch. Dist. No. 1, 469 F. 2d 623 (2d Cir. 1972), cert. den. 411 U.S. 932 (1973)] might be a source of confusion and therefore deserves further comment, especially footnotes 5-11 therein (id., at 628-32). From my reading, consistent with my previous comments on James and Goetz, the Court of Appeals, Second Circuit, held that Mrs. Russo "did not have any state administrative remedies to exhaust" because as in Goetz, there was a departmental regulation and a statute on the issue making any relief from the Commissioner of Education unlikely. See N.Y. Education Law §802; Russo v. Central Sch. Dist. No. 1, supra, 469 F. 2d at 632 n. 11; Goetz v. Ansell, supra, 477 F. 2d at 638 n. 6. In other words in Goetz and Russo (which involved very similar constitutional claims), the futility to petition the Commissioner of Education was apparent because to effect change he would have to contravene either his own regulation or a state statute. These cases indicate, in my judgment, that it is still necessary to exhaust administrative procedures that portend a speedy and effective remedy and review of the claimed constitutional violations, unless certain or probably futility can be demonstrated.

Moreover, as previously noted, it is clear that each case must be adjudged on its own factual situation and merit because the exhaustion prerequisite to § 1983 jurisdiction is not to be applied in an unrealistic or wooden fashion. Federal courts are handling the greatest number of civil rights cases in their history and the growing tendency to make a "federal case" out of questions that might well be settled on an administrative level should be dampened on the basis of common sense. See Negron v. Wallace, supra, 436 F. 2d at 1139 n. 1 (2d Cir. 1971); McCray v. Burrell, _____F. Supp. _____, 14 Cr. L. 2184 (D. Md. Oct. 16, 1973; released Nov.

21, 1973). Plaintiff essentially seeking reinstatement to his teaching position and contending that his termination was based upon considerations that violated his constitutional rights, has shown no reason why, in this sensitive educational situation, the Commissioner of Education could not weigh these serious assertions and provide this relief if, upon a hearing, the Commissioner found this to be so. Plaintiff thereafter will still have his choice of judicial forums, state and federal, should he be dissatisifed with the outcome or to pursue the balance of his complaint, e.g., money damages. James v. Board of Education, supra, 461 F. 2d at 571.

Although the case might end at this point, for purposes of assistance to future administrative or judicial effort that may be required, I will comment upon two other aspects of this case.

First, an alternative ground in the defendants' motions for dismissing the complaint was "because the complaint fails to state a cause of action against Defendants upon which relief may be granted." Aside from the technical inaccuracy of using the phrase "cause of action" [Fed. R. Civ. Pro. 12(b)(6); see Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi v. Durning, 139 F. 2d 774 (2d Cir. 1944)], there are in my opinion, sufficient allegations in the complaint to overcome such a motion. In a civil rights complaint, not only must the allegations be taken as true in terms of a motion to dismiss but they must be afforded special consideration because of the importance of these principles in our democracy. Holmes v. New York City Housing Authority, 398 F. 2d 262, 265 (2d Cir. 1968).

The complaint seems to adequately assert two well recognized areas protected by the Bill of Rights. The principal complaint made by

plaintiff is that the assignment made to his class involved a sexual subject matter that ultimately displeased the school board and, secondly, that some innuendo or rumor was used in the decision of the school board that impairs his professional reputation.

With respect to the former allegation, independent research has turned up numerous cases where federal courts have granted relief when similar fact situations were satisfactorily established. See Mailloux v. Kiley, 436 F. 2d 565 (1st Cir. 1971), affirming 323 F. Supp. 1387 (D. Mass. 1971), affirmed 448 F. 2d 1242 (1st Cir. 1971); Dunham v. Crosby, 435 F. 2d 1177 (1st Cir. 1970); Keefe v. Geanakos, 418 F. 2d 359 (1st Cir. 1969); Webb v. Lake Mills School District, 344 F. Supp. 791 (N.D. Iowa, C.D. 1972); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala., N.D. 1970); see also Healy v. James, 408 U.S. 169 (1973); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969); Simard v. Board of Education of Town of Groton, 473 F. 2d 988, 995 (2d Cir. 1968); compare, Hetrick v. Martin, 480 F. 2d 705 (6th Cir. 1973); Clark v. Holmes, 474 F. 2d 928 (7th Cir. 1972), cert. den. 411 U.S. 972 (1973); Eisner v. Stamford Bd. of Education, 440 F. 2d 803, 809 n. 6 (2d Cir. 1971); Drown v. Portsmouth School Dist., 451 F. 2d 1106 (1st Cir. 1971). In the light of these cases, it would be exceedingly difficult to characterize the complaint as frivolous. The allegation of loss of reputation was discussed in Board of Regents v. Roth, supra, and Perry v. Sindermann, supra.

The second point is that although the plaintiff's motion for injunctive relief is denied for want of jurisdiction, even had the issue been carried into the merits of the right to injunctive relief, there is case law in the Second Circuit questioning its grant on submission on the papers only with-

out evidentiary hearing that may be necessary in normal circumstances. See Dopp v. Franklin National Bank, 461 F. 2d 873, 878-79 (2d Cir. 1972); Semmes Motors, Inc. v. Ford Motor Company, 429 F. 2d 1197, 1204-06 (2d Cir. 1972); compare The Guardian Ass'n of the N.Y.C. Police Dept., Inc. v. Civil Service Commission of the City of New York, ____F. 2d ____, ____, Dk. No. 73-2083, Slip. Op. 473, 476-477 (2d Cir. Nov. 21, 1973). Counsel for the plaintiff seemed content to allow decision on the papers alone and there was no request or desire for an evidentiary hearing conveyed to me during oral argument. The facts of this case are crucial in the determinations requested and must be developed as fully and clearly as possible.

In conclusion, I wish to emphasize that federal courts are and should be reluctant to involve themselves in the operations of public schools. See Epperson v. Arkansas, 393 U.S. 97, 104 (1969); Eisner v. Stamford Bd. of Education, supra, 440 F. 2d at 810. This does not mean, however, that where a violation of constitutional rights is demonstrated that a federal court would or should hesitate where federal constitutional rights are violated to remedy at the appropriate stage such situations in public school administration. Tinker v. Des Moines Ind. Community Sch. Dist., supra; Hostrop v. Board of Junior College Dist. No. 515, etc., Ill. 471 F. 2d 488 (7th Cir. 1972), cert. den. 411 U.S. 967 (1973). However, the failure to exhaust the available administrative remedies in this situation and the lack of any convincing showing that it would be somehow futile to do so, compels the dismissal of the complaint for lack of jurisdiction.

The motions of the defendants' are granted for the reasons stated herein and plaintiff's motion for a temporary restraining order and pre-

liminary injunction is hereby denied and dismissed.

It is so Ordered.

Dated: February 15, 1974

Albany, New York

/s/ James T. Foley
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

Civil Action

No. 73-CV-562

MOTION TO RECONSIDER

PLEASE TAKE NOTICE, that pursuant to Rule 52 (b) of the Federal Rules of Civil Procedures, the undersigned will bring the annexed motion for reconsideration and amendment of the decision, order and judgment herein on for hearing before the Hon. James T. Foley, U. S. District Court, Federal Post Office Building, City of Albany, New York, on the 18th day of March, 1974, at 10:00 o'clock in the forenoon of that date, or as soon thereafter as counsel can be heard.

Dated: February 28, 1974

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Attorney for Plaintiff
Office & P.O. Address
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

James R. Sandner
Ivor R. Moskowitz
Of Counsel

TO: EVANS, SEVERN, BANKERT & PEET
Attorneys for Defendants
Baker, Melie, Acee, Barns, Nowak,
Plehn, Richards, Romeo and Walker
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

- against -

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

Civil Action

No. 73-CV-562

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ALBANY)

IVOR R. MOSKOWITZ, ESQ., of counsel to Bernard F. Ashe, Esq., attorney for plaintiff Francis C. Plano, for his Affidavit does hereby depose and say:

1. That deponent is of counsel to Bernard F. Ashe, Esq., attorney for plaintiff, Francis C. Plano.

2. That deponent is completely familiar with all of the facts of this case.

3. That deponent makes this affidavit and submits the accompanying Memorandum of Law in support of plaintiff's motion for reconsideration and

amendment pursuant to Rule 52 (b) of the Federal Rules of Civil Procedure of this Court's Memorandum Decision, Order and Judgment dated February 15, 1974 and entered on February 15, 1974.

4. That a copy of this Memorandum Decision, Order and Judgment [sic] / was served upon the attorney for plaintiff by mail, and received in this office on February 19, 1974.

5. That the Memorandum Decision, Order and Judgment of this Court should be reconsidered and amended because:

a) An appeal to the Commissioner of Education is futile because of procedural administrative barriers to the resolution of conflicting allegations and the presence of serious constitutional issues as to the adequacy of any such administrative review.

b) An appeal to the Commissioner would be untimely under Commissioner's Regulation 275.16 and foreclosure of court review of what the court admittedly concedes are substantive constitutional questions.

c) No issues of New York State Education Law are presented for the Commissioner's review and in light of New York law it is questionable whether he would have accepted jurisdiction.

6. That deponent requests oral argument before this Court on this motion.

7. That deponent prays for such other, further, and different relief as to this Court shall seem just and proper.

Sworn to before me this
28th day of February, 1974.

/s/ Patricia A. Colitsas
Notary Public

PATRICIA A. COLITSAS
Notary Public in the State of New York
Residing in Albany County
My Commission Expires March 30, 1974

/s/ Ivor R. Moskowitz
Ivor R. Moskowitz

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 - Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	Civil Action No. 73-CV-562 ANSWERING AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONEIDA) ss.:
CITY OF UTICA)

MICHAEL P. DeSANTIS, being duly sworn, does hereby depose and say:

1. Your deponent is attorney for the defendants Clifford W. Baker, as Supervising Principal of Westmoreland Central School District, Frank R. Melie, as Clerk of the Board of Education of Westmoreland Central School District, John Acee, Cynthia Barns, John A. Nowak, James G. Plehn, Barbara Richards, Mickey Romeo, Howard Walker, as members of the Board of Education of the Westmoreland Central School District, and the Board of Education of the Westmoreland Central School District.

2. Your deponent is fully familiar with all of the matters herein.

3. Your deponent makes this affidavit in opposition to the affidavit and notice of motion heretofore submitted pursuant to Rule 52 (b) of the Federal Rules of Civil Procedure.

4. Said motion should be denied because

(a) It is untimely. The Court's decision, order and judgment was entered in the Clerk's Office of the United States District Court for the Northern District of New York on February 15, 1974. The motion papers herein were received at deponent's office on March 1, 1974. Section 52 b states as follows: " - - - upon motion of a party made not later than 10 days after entry of Judgment the Court may amend its findings or may make additional findings and may amend the Judgment accordingly."

(b) Plaintiff has made no effort to appeal to the Commissioner of Education at any time. Before any conclusions as set forth in Plaintiff's motion papers can be made, the appeal to the Commissioner should first be taken.

(c) Deponent feels that the other points raised have already been previously raised and gone into at length.

WHEREFORE, deponent prays that Plaintiff's motion herein, be denied in all respects.

/s/ Michael P. DeSantis
Michael P. DeSantis

Sworn to before me this 6th
day of March, 1974.

/s/ Jeanette R.Nawoj
Commissioner of Deeds, City of Utica, N.Y.
Comm. Exp. 12/31/74

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO, Plaintiff, vs. CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Defendants.	ANSWERING AFFIDAVIT AND MEMORANDUM Civil Action No. 73-CV-562

STATE OF NEW YORK)
: ss.:
County of Oneida)

ARTHUR F. BARNS, being duly sworn, deposes and says:

1. Your deponent is an attorney at law and a partner in the firm of Evans, Severn, Bankert & Peet, attorneys for the defendants Baker, Melie, Acee, Barns, Nowak, Plehn, Richards, Romeo and Walker, individually, in the above-entitled matter.

2. Deponent makes this affidavit in opposition to the Affidavit and Notice of Motion submitted by plaintiff pursuant to Rule 52(b) of the Federal Rules of Civil Procedure.

3. The Judgment which is the basis of the present motion was entered

February 15, 1974. The motion papers herein were received in plaintiff's office March 1, 1974.

4. This motion should be denied because:

(a) It was not made within the prescribed period. Rule 52(b) states:

> "(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly...." (Emphasis added).

Since the Judgment was entered February 15, 1974, the last day for the bringing of the motion was February 25, 1974, which was not a Saturday, Sunday or legal holiday pursuant to Rule 6(a) of the Federal Rules of Civil Procedure.

The Court cannot enlarge the time requirement of Rule 52(b). See Federal Rule of Civil Procedure 6(b).

The 10-day period specified in Rule 52(b) commences to run upon date of entry and not upon notice of entry. 5A Moore's Federal Practice, §52.11 [1] n. 11.

(b) Rule 52(b) is not a proper vehicle for the Plaintiff to seek relief by requesting this Court to reverse its Judgment.

Rule 52(a) states:

> "(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon.... Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion...." (Emphasis added).

Rule 52(b), as set forth above, states that the Court "may amend its findings or make additional findings."

Defendants' motion in the instant case was granted on the pleadings, and no findings of fact were required.

Plaintiff has presented no new relevant facts which were not previously before the Court and is simply requesting the Court to grant a re-hearing. It is not the function of a motion for amendment of findings to serve as a vehicle for a re-hearing. See Minneapolic-Honeywell Regulator Co. v. Midwestern Instruments, Inc., D.C.Ill.1960, 188 F.Supp. 248, affirmed 298 F.2d 36.

(c) Plaintiff is not foreclosed from appealing to the Commissioner of Education. As Plaintiff points out at page 7 of his Memorandum of Law on this motion, the Commissioner may excuse late filing for good cause shown. Plaintiff very promptly, after his dismissal, brought his motions in Federal Court. The Federal Court directed that he appeal to the Commissioner of Education. This is certainly "good cause" for the Commissioner of Education to allow an appeal before him, despite the fact that the 30-day appeal period expired while Plaintiff's said motions were being resolved.

/s/ Arthur F. Barns
(Arthur F. Barns)

Subscribed and sworn to before me
this 11th day of March, 1974.

/s/ Margaret J. Calicchia
MARGARET J. CALICCHIA
Notary Public in the State of New York
Appointed in Oneida County
My Commission Expires Mar. 30, 1974

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- -

FRANCIS C. PLANO,

vs.

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District; F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties; FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District; JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York

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73-CV-562

The following proceedings took place on the 18th day of March, 1974, at the United States District Court, Northern District of New York, Federal Building, Albany, New York, before HON. JAMES T. FOLEY, United States District Judge.

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APPEARANCES:

BERNARD F. ASHE, ESQ.
James R. Sandner, Esq.
Of Counsel
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Attorney for Clifford W. Baker,
Frank R. Melie, John Acee,
Cynthia Barns, John A. Nowak,
James G. Plehn, Barbara Richards,
Mickey Romeo and Howard Walker

MICHAEL P. DeSANTIS, ESQ.
Attorney for Board of Education of
the Westmoreland Central School District, et al

JOHN C. SCHOLL, ESQ.
Attorney for F. Wright Johnson

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THE COURT: All right, Mr. Sandner, you may speak first.

MR. SANDNER: Thank you, Your Honor.

THE COURT: Your motion here is one for reconsideration?

MR. SANDNER: That's correct, Your Honor.

THE COURT: Of my decision?

MR. SANDNER: Of that portion of your decision in which you concluded in your judgment that the appeal mechanism under Section 310 of the Education Law for appeal to the Commissioner of Education in this case should be exhausted prior to coming into Federal Court.

THE COURT: My decision is dated February 15, 1974.

MR. SANDNER: That's correct, Your Honor.

THE COURT: And I granted the motion of the defendant and denied your motion for a restraining order, temporary restraining order, preliminary injunction.

MR. SANDNER: That's correct.

THE COURT: So did you really think

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that your motion under Rule 52(b) fits this situation?

My experience is that applies to court trials, juries, jury verdicts that are returned or court findings made after a hearing or trial, and I don't know if it involves or applies to reconsideration, which I think is inherent in the power of the judge to entertain if he so sees fit.

MR. SANDNER: Yes, I believe that is true, Your Honor, it does not appear there is another specific provision under which we could proceed, and it is apparent from your judgment that there were findings made therein, particularly about inadequacy of remedy.

THE COURT: Those aren't really findings, they are rulings of law. But I am going to entertain your petition, but it is pointed out, of course, by Mr. School in his brief, that it may be untimely under the particular rule you selected. You had a ten day period. The date of your notice of motion was thirteen days, is that correct?

MR. SANDNER: The motion has been made under 52(b), it says ten days from date

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of entry. The decision and order was entered on the 15th of February. However, it was not received in our office and we had no notice of it until February 19th, there being a holiday on Monday, February 18, and we believe that considering the rules, reading them together, 6(b) and 6(e) that an additional three days for mailing could be accorded in that case in order to allow the opportunity for filing within ten days. In other words, you have a total of 13 days. We believe equity should require that, to be filed within that time period.

THE COURT: I will excuse you and I think maybe the Commissioner of Education has the same power to excuse any filing up there after 30 days, specifically by the statute that controls it. He has the discretion there. Your claim is that you are barred from going back there for administrative remedy because the 30 day period has transpired?

MR. SANDNER: That is one of the parts of our motion, yes, Your Honor.

THE COURT: But right in that statute

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that is why it is in that statute, it gives the Commissioner discretion to still entertain your request for hearing, doesn't it?

MR. SANDNER: That's correct, Your Honor.

THE COURT: How do we know that he won't entertain it until you apply to him for a hearing?

MR. SANDNER: I haven't been able to find a case, but I am pretty sure there is a case in which this sort of situation has come to the Commissioner before. I say my recollection is that there was such a case. I have been practicing before the Commissioner about six and a half years, and to my recollection there are very, very few cases where exercise of discretion for good cause shown to extend the period beyond 30 days--

THE COURT: At least you ought to give him the opportunity to so rule, I think.

MR. SANDNER: Yes, Your Honor. Well, all I can say to that is that the rule is there and it has been interpreted by some of the courts of the State of New York in such fashion as to be critical of the Commissioner

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where he has attempted to extend it. That is not to say he has no discretion, it is problematical, however, whether or not he would exercise it in our favor in this particular case. He may well take the position that we elected a remedy and elected wrongfully; therefore, we will have to bear the burden of that error, and that would leave us out of court and out of the Commissioner's office. I don't know what he is going to do with that, he does not often exercise in favor of appellants, that is my experience before him in practice.

The other point that we raise on reconsideration is the inadequacy of the remedy would come only if he did exercise his discretion, allowed us to submit an appeal, the question of what we would be able to accomplish before the Commissioner. The regulations as noted in our memorandum of law, the memorandum on this point, clearly preclude a hearing in the traditional sense. No witnesses are called, there is no cross examination permitted, all the proceeding before the Commissioner is really, and he says it time and again in these decisions, it is appellate practice. To my

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mind that indicates that there has been a hearing where an opportunity to be heard was had at some other place, and then we come to him and he reviews what has already happened before.

In accordance with his view and the fact that he views it as an appellate process, you are there on the papers and when you do come to the calendar for argument, it is an oral argument as in an appellate case, and despite repeated requests, particularly from myself to the Commissioner on cases I have handled there, we have never succeeded in having a hearing, he has never convened or had a stenographer present or allowed us to produce witnesses or take testimony.

So you come down to the really basic problems, oft times we would have a series of responding affidavits back and forth with questions yet to be resolved, and they are resolved by the Commissioner when he writes his decision. However, he does not have the opportunity to make a decision based on the credibility of the witnesses, particularly where there are points or facts which are

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directly controverted by opposing affidavits. Somehow the decision is made, and I quite frankly do not know how it is made.

THE COURT: Don't the Federal Courts do that? The State courts do it. The Appellate courts, they always review records and make decisions, see whether there is enough before the hearing body or hearing officer to justify the decision?

MR. SANDNER: But since in this case it is very clear there was no hearing accorded to the plaintiff, there was never a trial in which the Commissioner sitting in an appellate capacity may make a review of that record, there is no record of that, the record that the Commissioner looks at would be the papers that are presented on behalf of the plaintiff, petition, any supporting affidavits, the answer and the supporting affidavits of the defendant and any reply or other papers required by the Commissioner.

THE COURT: How do you know he won't have enough before him to make a decision in favor of your client? He may say these reasons aren't supported. At least he can't be a

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hypocrite about it, he must look into it, doesn't he?

MR. SANDNER: That possible consequence has never led him to hold a hearing, and I think that as Your Honor points out in your decision, perhaps there are factual issues that must be resolved, and we are pointing out the forum provided by the Commissioner already conceives of some other form of process having taken place, he leaves it up to the parties, perhaps with some guidance from the counsel, to submit papers that may resolve the dispute.

In my judgment, I have had cases there where there were outstanding factual issues, and in some fashion the Commissioner had resolved them without the benefit of having heard witnesses in support of either the position or in support of the facts asserted.

THE COURT: Were you ever successful in any of the cases you had before the Commissioner?

MR. SANDNER: Did he ever rule in our favor?

THE COURT: Yes.

MR. SANDNER: I am happy to say that

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I am quite successful there.

THE COURT: Has he?

MR. SANDNER: Yes, Your Honor.

THE COURT: That shows he isn't completely biased.

MR. SANDNER: The cases we usually take to the Commissioner are ones limited to matters that are peculiarly within his administrative competence, namely issues that can only be decided by the Commissioner, or questions that deal in part within interpretation of state statute. We also have gone to the state court on that kind of a question, also, and we have a right to go either place, but we usually limit it to those two instances. We do not usually bring questions that involved in any way constitutional issues.

THE COURT: Well, you brought the Fordham case in this court here?

MR. SANDNER: That's correct, Your Honor.

THE COURT: I dismissed it on the grounds of administrative remedy should be exhausted, and the Court of Appeals agreed.

MR. SANDNER: Yes, Your Honor.

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THE COURT: And not that I want to boast about that affirmance, because they reverse me too at times, but it was decided February 20, 1974, and in there they point up the value of having this type of administrative hearing, because the case we have here was the composition on pre-marital sex and was an English instructor, and at least you have the expertise of the Commissioner to review it, he knows a lot more about those things than I do, whether you should teach pre-marital sex in sophomore or senior, maybe you should teach it in sixth grade, but I have no knowledge of it.

You are claiming infringement of a constitutional right. There defense is going to be there are other reasons. First I think the Commissioner should look at those other reasons to see if they are supportable, if they are not, they may say to reinstate this teacher.

MR. SANDNER: Well, Your Honor, I understand what Your Honor is saying, however, I think the James decision, it may be the Commissioner is the administrative officer that

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can speak in that capacity in what he feels is good for the schools or not, as he did in the James case, he said that it is not, sort of instructing the school board and the teacher in that regard, and as a result of that he put on his other hat or turned his hat around so he was making the decision as the judge, he relied on his administrative consideration of the matter to say "Well, no constitutional rights were abridged."

THE COURT: But isn't that the best example you have that he treated constitutional rights and considered them, thought about them?

MR. SANDNER: The history of the case I think to my mind teaches that ultimately the proper forum, namely, I believe, Federal court, would have to solve the very issue of the constitutional question. I think the Commissioner in that case initially avoided it, and I think that is what the Court of Appeals said when it, in fact, overruled his decision and came up with a different result.

THE COURT: It went to a Federal judge first, and he dismissed it without any

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hearing.

MR. SANDNER: Yes, he took the position it was res judicata.

THE COURT: But anyway there was a case in Mr. Scholl's brief, I think we should state it for the record, it shows the Court of Appeals of New York, and I keep insisting, I am going to keep insisting that these cases belong in my judgment in the State courts, but of course you have your choice here and we can't close the doors on you, but the case is Matter of Board of Education of New York against Allen, 6 NY (2d) 127, 1959. The court there upheld the Commissioner's order to reinstate several teachers who were dismissed because they would not answer questions about other teachers having Communist-- that must have involved, I am sure, some constitutional questions, and also the Commissioner of the State of New York takes an oath under the public officers law to uphold the United States Constitution as well as the New York State Constitution.

MR. SANDNER: Yes, Your Honor. I have not read that case recently, but I am

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pretty sure that there were a series of cases in which the Commissioner did what he did because of the refusal to answer questions. It came out of New York City, as I recall it, and I believe one or more of those cases were appealed to the Supreme Court and subsequently overruled, and the teachers have gone back to the Commissioner and been denied redress on the grounds that they should have pursued the remedy at that time, they shouldn't let it lie. I don't know if that is this case, is earlier or later, my recollection is one of those cases was overruled subsequent to 1959, but I just can't recall it at the moment.

In any event, the Court of Appeals may sustain the Commissioner, and in fact most of the cases that have gone that far, they have clearly indicated the Commissioner of Education, the statute under which he operates, really puts him as a power apart, his decisions in fact under the statute are non-reviewable. The Court of Appeals, however, have undertaken to allow reviews to a limited extent, but only where the Commissioner's decision can be found to be purely arbitrary, a higher standard

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of test than arbitrary and capricious test that is usually applied to administrative agencies. The substantial evidence question never comes into play because there is no record. You mentioned the Casella decision, because of the difficulty in reviewing a decision of the Board of Education in terminating a tenured employee, we draw the same analogy to it.

THE COURT: What decision was that? Was that the one Judge Henderson wrote?

MR. SANDNER: Yes, Your Honor.

THE COURT: I read that again last night, that indicates to me that that three-judge court said o.k., these administrative hearings are all right, they endorse them practically, but they said you have to have some additional safeguards, you have to have decisions based upon the evidence elicited before the hearing panel and the board to set forth the reasons. It is only those two elements that made it unconstitutional, that was the Casella case against the Board of Education, Civil 1973-187. I don't know if there is a date on it.

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MR. SANDNER: Yes, it was decided February 19, 1974.

THE COURT: You are familiar with that case, aren't you?

MR. SANDNER: Yes, I argued the case.

THE COURT: Did the Attorney General take any appeal in it?

MR. SANDNER: Not to my knowledge.

THE COURT: My understanding is they are going to conform and try to meet these conditions that the three judges set down.

MR. SANDNER: There have been regulations adopted by the Commissioner and the Board of Regents, and currently in litigation on that question. The only reason we alluded to that decision, Your Honor, I think an analogy can be drawn between what the court in that case said about the difficulty in reviewing a decision by the Board of Education in terminating or otherwise penalizing a tenured school teacher than the difficulties of reviewing.

THE COURT: You have a non-tenured?

MR. SANDNER: Yes.

THE COURT: There is a distinction

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there in the Perry case.

MR. SANDNER: Yes, Your Honor, but the analogy I would like to draw is between the difficulty of reviewing in that situation and the difficulty of review which is inherent in a review from a Commissioner's decision. As I have already indicated, there is no hearing, there is no transcript, the record in the case for review, a decision by the Commissioner of Education typically in this state is the Article 78 petition filed by an aggrieved party, and any response thereto, and oft times the Commissioner will file a return constituting nothing more than the pleadings and affidavits that were before him below, but it is very difficult to review his mental process and the basis for his decisions on a record in any other forum, either in the state courts or in the Federal courts, so that we submit that to review a decision in this case --

THE COURT: You argue that for that reason everything should come into the Federal courts for the trial denovo?

MR. SANDNER: Not necessarily, Your Honor, it would depend on the circumstances.

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We think this case is peculiarly fit for trial in the Federal court, inasmuch as we are raising an issue, a serious constitutional question that needs resolution through the trial process.

I am just trying to point out to Your Honor that there are difficulties and shortcomings for the Commissioner of Education. I don't know whether that is going to continue forever, it has continued.

THE COURT: Do you represent the Teachers' Association?

MR. SANDNER: That is one of my jobs.

THE COURT: I mean they are a powerful group, they should go to the legislature and Governor and change it all.

MR. SANDNER: That might be a good idea, but I don't think the practical realities are such at the moment that we have that kind of strength.

THE COURT: Well, O.K. You also have in your brief the point that you ask for a temporary restraining order, a preliminary injunction, that Mr. Ashe thought I would have a hearing later. My experience is they go

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separately, you take your restraining order in order to reserve the status quo until the preliminary injunction. I told Mr. Ashe this case belonged up in Utica or Westmoreland, there was a motion day up there, but I took it here today. It has proven today how inconvenient it is. We had a snow storm in Syracuse and Utica and these lawyers couldn't get here today.

If we have witnesses, we would have to bring them from Utica to Albany, that is one consequence of bringing the motion in the place where it should be, and it is neither here nor there, but it has to be met.

MR. SANDNER: Yes, Your Honor, just one other point.

THE COURT: The one I have from Syracuse is another school teachers case, but that is before me because Judge Port is disqualified, he is a Trustee of the university.

MR. SANDNER: There is one other point, Your Honor, if I may, and that is again alluding to the difficulty of reviewing the Commissioner's decision. It seems to us that in that review it would be almost necessary to

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have a trial denovo to litigate or at least argue the whole issue of the constitutional concepts of any facts that can be established. I think that is exactly what happened in the James case. The Commissioner made one decision and I think the court totally disregarded that and started afresh from the pleadings and posture of the case as it came to the Second Circuit, so the ultimate resolution of the constitutional question has to be by higher authority, and the most appropriate forum we would like to see handle it is the Federal court, it would save a lot of time because once those issues are resolved,that is the end of the case.

THE COURT: Well, I am firm in my belief and I have written it another of times that administrative remedies have to be exhausted. This might be the type of case that should go to the Court of Appeals, Second Circuit. The district judges ought to know are we going to review all these type cases before the administrative procedures are exhausted, because it seems we are going to have people and problems and teachers with nothing

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in between, there are going to come to Federal judges. We have no answer to everything that is wrong in life, these things I think should be clarified by the Court of Appeals, Second Circuit.

I am eager to get rulings of that kind. The Court of Appeals, Second Circuit, emphasized in the last case that they haven't retreated from Eisen versus Eastman. The Supreme Court in the Gibson case, I guess it is, they said that in certain instances exhaustion should be required, and I think this is the particular field, if any, that needs exhaustion, looking over, screening by administrative bodies trained in teaching, they are a wonderful group, the teaching group, the Commissioner has a staff, those people are at it everyday, the courts of New York under Article 78, and they are right up the street here, I know most of them and they screen these school teacher things and have been ever since I was a lawyer, ever since I have been a judge, but I think that if you are going to insist on coming here, that we should get some rulings from upstairs.

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MR. SANDNER: Yes, Your Honor.

THE COURT: Do you lawyers want to say anything? You can state your position. I wish you would do it briefly. I did review it, I know it is an important case, it is important to this plaintiff, it is important to the community up there, but I have reviewed it and I am sure you can tell from my indication that I am inclined to deny this motion to reconsider. If you want to state your position briefly, something I haven't covered, you can do it.

Mr. DeSantis?

MR. DeSANTIS: You have covered the elements, Your Honor, the time elements, and I have raised this point in my brief. The only other point that I can raise which also I feel was covered, the regulation pertaining to appeals to the Commissioner certainly allow the Commissioner to extend this time to appeal, there is no question about that, and I have one case that I have been able to find in the brief time I have studied this, Matter of Feinberg, which is a decision of the Commissioner where they were given time beyond the

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thirty days.

The important thing is no one is going to know what the good cause is until the appeal is actually filed with the Commission, because it is then that he decides. Even in cases where the Commissioner has -- cases that were years old when the notice of appeal was filed to a Commissioner, cases that were many, many months old, in fact the Commissioner went into the merits of these cases and discussed the entire factual situation and made a decision even on that, and then later said that laches are involved because too much time was taken to appeal, but the Commissioner did in many of the cases that I have found, he did make a finding as to the facts of the case.

In any event, for good cause shown the statute states that the Commissioner can hear the appeal. Of course, you are not going to know it until they -- we are entitled to know this.

One other point on this question of difficulty of review that the plaintiff mentions here, these rules of the Commission provide the most beautiful pattern or record for

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review in the world. It says that all evidentiary material shall be presented by affidavit or by exhibits. The party appealing to the Commissioner can submit any and all papers, any and all affidavits, any and all exhibits, he could present a book bigger than Gone With the Wind to go up to the Commissioner to determine the case. Talk about a record, it really is an opportunity for a plaintiff to make whatever record he wants. He can submit all of these papers to the Commissioner, and of course we have to answer them, but insofar as a record is concerned, I am sure that they are entitled to make as fine a record as they wish for the Commissioner to look at.

I believe that covers it.

THE COURT: All right. Mr. Barnes?

MR. BARNES: I would like to emphasize two points in my memorandum, Your Honor. Number one, it is untimely. Number two, it is not the proper vehicle, this is not a proper vehicle in this situation.

MR. SCHOLL: Your Honor, in view of your remarks, I will limit mine to just the fact that I join in the arguments that have

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been made by co-counsel.

THE COURT: All right. I do want to state as a matter of interest, in this morning's Times Union, Albany Times Union of this date, we get the Rensselaer County edition, I live across the river, there is a big write-up there of a nurse-school teacher, they had some problems a year or two back with teaching sex, different things along the line they teach young students, and now have a nurse teacher who is teaching these things. One of them is the subject of part of the composition here, and it seems to have worked things out and she is teaching it to the juniors and seniors, I don't know about the sophomores, but that is what the article says. It shows the responsive attitude, I think, throughout the school system, that they are going to try to correct and change and we all learn as we go along.

I never really agreed with their ruling of my friend Judge Feinberg, knowing the record is going to get there, the Goetz case. He already made his mind up, but the courts and judges changed their minds from

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case to case, particularly the Supreme Court, so I think that a Commissioner might, too, but I deny the motion for a reconsideration. I do entertain it, it seems it is very questionable as to whether it is a proper type motion, and, Mr. Sandner, I made this decision quickly because I know you want to file your notice of appeal today. This is your last day as I understand it.

MR. SANDNER: That's correct. I appreciate that.

THE COURT: You may have an order of some type to file before you file your notice of appeal. The Clerk's office will be open here.

MR. SANDNER: All right, Your Honor.

THE COURT: Do you want to draw an order? I think you should.

MR. SANDNER: Shall I draw the order?

THE COURT: Well, I don't know, these lawyers are from out of town, maybe you can dictate it to somebody here.

MR. SANDNER: All right, thank you, Your Honor.

THE COURT: I did state the reasons

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fully in my opinion. I read that again. In my judgment, administrative remedies should be exhausted, particularly in this type of a case, and I couldn't set it forth any more in detail than I did in the opinion.

All right.

* * *

This is to certify that the foregoing record is a true and accurate transcript of the proceedings had at the time and place noted in the heading hereof.

Official Court Reporter
United States District Court
Northern District of New York

U.S. COURT REPORTERS
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UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

FRANCIS S. PLANO,

Plaintiff,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

Civil Action
No. 73-CV-562

ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDMENT OF DECISION, ORDER AND JUDGMENT

Plaintiff having made a motion for reconsideration pursuant to Rule 52(b) of the Federal Rules of Civil Procedure and amendment of the Decision, Order and Judgment herein entered on the 15th day of February, 1974 and upon hearing argument by counsel for plaintiff and counsel for all defendants, and due consideration having been had upon said motion, it is

ORDERED, that plaintiff's motion for reconsideration and amendment of the Decision, Order and Judgment herein be denied.

Dated: March 18, 1974
Albany, New York

/s/ JAMES T. FOLEY
James T. Foley
Chief Judge

E N T E R :

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS C. PLANO,

Plaintiff,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Defendants.

NOTICE OF APPEAL

Civil Action

73-CV-562

NOTICE IS HEREBY GIVEN that FRANCIS C. PLANO, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order and Judgment of Chief Judge James T. Foley, denying plaintiff's motion for a Temporary Restraining Order and Preliminary Injunction, and dismissing plaintiff's complaint for lack of jurisdiction entered in this action on the 15th day of February, 1974, and from the order entered on March 18, 1974 denying plaintiff's motion for reconsideration and amendment of said decision, order and judgment.

Dated: March 18, 1974.

BERNARD F. ASHE
Attorney for Plaintiff
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

EXHIBIT: SEX EDUCATION COMES TO
AVERILL PARK, SUBMITTED BY FOLEY, C. J.
SUA SPONTE

With success due to the teacher

Sex education comes to Averill Park

By LINDA ROSENBLATT

There's nothing really new about sex education courses being offered at the high school level, a controversial concept that has caused communities from Eureka, Calif. to Skaneateles to seethe with anger.

But in Averill Park – the community that just three years ago was embroiled in a high school book-banning controversy over the use of such scintillating literature as J.D. Salinger's "Catcher in the Rye" – the idea became a reality last September.

That's when Averill Park High School introduced a course to its juniors and seniors entitled "Patterns for Living" and so far, school board members, parents and students are more than pleased with the results.

The apparent success of the course is due largely to Mrs. Susan Purdy, school nurse teacher who spent months preparing the course curriculum and garnering support of parents, clergy and fellow teachers.

She also passed the test of an initially hesitant school board which pelted her with a battery of "very tough questions."

The board was mostly concerned with a teacher's ability to remain objective about some very touchy issues and to refrain from subjecting the students to the teacher's own values," recalled the pert and attractive registered nurse and certified school nurse teacher.

Some board questions involved how she would react to student queries about such hot issues as abortion and birth control. Mrs. Purdy's credentials in counseling – an area which demands objectivity and impartiality – and the fact that issues like abortion are openly discussed and debated in other courses, probably helped to quell the board's reservations about the course, she noted.

So, "Patterns for Living", a health elective offered to juniors and seniors, is alive, well, and helping students to deal with such topics as male and female role identity, sexual maladjustments – including homosexuality – promiscuity, premarital pregnancy and unwed mothers and fathers, venereal disease and teenage marriage.

Actually, the course – broken into five major units entitled "Understanding Yourself and Others", "Men and Women", "The Family", "Marriage and Early Years of Responsibility" and "Living with the Older Generation" – covers an extremely broad range of concerns.

Starting out with knowledge from the studies of anthropology, sociology and psychology, the units stress such concepts as intelligent choice of sexual code and conduct, the role, function and future of the family, making a marriage work, marital problems and approaching parenthood, understanding

your parents and grandparents and evaluation of ones's life.

Living with the Older Generation is one of the most popular units, according to Mrs. Purdy who says students have come back to her with reports of positive results that come from grasping the concepts.

"I know it sounds corny, but some kids have come to me saying that something they tried out really helped them understand and communicate with their parents better," she said.

And although she does not prepare lessons or deal directly with such issuses as abortion and birth control, she will answer any student question "the best way I know how. Sometimes I don't have a definite answer and will tell them so."

The biggest problem thus far seems to be getting the students to open up more in class. "We want them to learn to accept the opinions of others and not to be afraid to express their own." This lesson, she stressed, is an additional benefit that can be derived from the course because to her "the class is a microcosm of the world."

A sampling of student reaction to the class confirmed Mrs. Purdy's enthusiasm and a visit to the class revealed thoughtful student reaction to questions posed by her and a film strip that payed much attention to the stereotyping of male and female roles.

And that's probably no accident. Susan Purdy sees her job as a way of helping young people explore themselves and to use the information she imparts to help make their own opinions.

"I can only bring them the entire range of points of view. But they must make these important decisions for themselves."

TIMES-UNION Albany, Monday, March 18, 1974